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No. 425

In the Supreme Court of the United States

OCTOBER TERM, 1950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HIGHLAND PARK MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINION BELOW

The opinion of the court below (R. 120–124) is reported at 184 F. 2d 98. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–34) hereinafter referred to as the "Board" are reported at 84 N. L. R. B. 744.

JURISDICTION

The decision of the Court of Appeals was issued on September 2, 1950. The petition for writ of certiorari was filed on December 1, 1950, and granted on February 26, 1951. The jurisdiction of this

Court rests on Section 10 (e) of the National Labor Relations Act as amended, hereinafter referred to as the "Act."

QUESTIONS PRESENTED

1. Whether an employer has a justiciable right, in an enforcement proceeding against it, to a determination by the court as to whether the charging union has complied with Section 9 (h) of the Act.

2. Whether Section 9 (h) requires filing of non-Communist affidavits by officers of a National federation with which a charging international union is affiliated, as a prerequisite to the issuance of a Board complaint, even though the officers of the charging union have filed such affidavits.

STATUTE INVOLVED

Principally involved is Section 9 (h) of the Act, the pertinent part of which reads as follows:

> * * * no complaint shall be issued pursuant to a charge made by a labor organization * * * unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party [and does not have the proscribed associations or beliefs].

The full text of Section 9 (h) as well as other relevant provisions of the Act (61 Stat. 136, 29 U. S. C., Supp. III, 141 et seq.) is set out in Appendix I, *infra* pp. 140–150.

STATEMENT

A. THE UNFAIR LABOR PRACTICE

The proceedings culminating in this litigation were commenced on March 28, 1946. On that date Textile Workers Union of America, hereinafter called the Union, filed a petition for investigation and certification of representatives under Section 9 (c) of the Act, claiming exclusive bargaining rights for certain employees in one of respondent's plants (R. 68). On April 10, 1946, respondent and the Union agreed to the conduct of a consent election by the Regional Director of the National Labor Relations Board to determine whether the Union represented a majority of the employees in the stipulated appropriate unit (R. 11; 69).[1]

The election was held on May 1, 1946. Four hundred and two ballots were cast, of which 197 were for the Union, 194 were against the Union, and the remaining 11 were challenged by the Union (R. 11; 72–75). On May 29, 1946, the Regional Director upheld the Union's challenges and rejected the 11 ballots.

On or about June 5, 1946, respondent filed exceptions to the Regional Director's ruling on the

[1] References preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

challenges and requested the Board to overrule the Regional Director or to give it the opportunity to present further evidence (R. 2; 87–88). On June 28, the Board denied respondent's requests on the ground that both the agreement for the consent election, signed by respondent, and the Board's Rules and Regulations, pursuant to which the agreement was drawn, expressly accorded finality to the Regional Director's rulings on challenged ballots (R. 13; 85).[2]

On June 25, after its victory in the election, the Union requested a bargaining conference with respondent (R. 13; 80). On June 28, respondent replied that it was unnecessary to refuse or accede to the Union's request because of respondent's then pending exceptions to the Regional Director's report (R. 13; 81). Following the Board's ruling on the exceptions, respondent refused numerous further requests for bargaining made by the Union, on the ground that it intended to continue to press its objections to the Regional Director's ruling (R. 13; 37, 53, 68, 79).

The Union thereupon attempted to overcome respondent's reservations concerning its majority status by offering additional proof. During the summer of 1946 it offered to demonstrate its

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[2] See Rules and Regulations of the National Labor Relations Board, Series 3, Article III, Section 12 (8 Fed. Reg. 16047, 16054) in effect at the time of the execution of the agreement.

majority status by a crosscheck of Union cards against respondent's payroll. Respondent flatly rejected this offer (R. 20–21; 36).

Still endeavoring to convince respondent of its majority status, the Union secured the signatures of a majority of the employees in the unit to new designation cards (R. 21; 36–37, 84) and, starting on September 10, made three offers to respondent's officers to check these new cards against respondent's payroll (R. 21–22; 37–39, 79). These requests, too, were refused (*ibid.*).

On September 13, 1946, almost a year before the Taft-Hartley amendments, the Union filed with the Board a charge that respondent had violated Section 8 (5) of the National Labor Relations Act, by refusing to bargain collectively with it. It was upon this charge that the Board's complaint in this proceeding was ultimately issued.

B. THE TAFT-HARTLEY AMENDMENTS AND PROCEDURE ADOPTED BY THE BOARD THEREUNDER

The Taft-Hartley amendments were passed on June 23, 1947, and became effective on August 22, 1947. Sections 9 (f), (g) and (h), which were newly added by the amendments (Appendix I, pp. 142–145, *infra*), directed the Board and the General Counsel not to take action on any union petition for a collective bargaining election, not to entertain any petition for a union shop authorization election, and not to issue any complaint alleging

the commission of an unfair labor practice unless the petitioning or charging union, and any national or international labor organization with which it was affiliated, filed certain financial and other information with the Secretary of Labor and kept it annually up-to-date, and unless the officers of those unions filed non-Communist affidavits with the Board.

At the time Sections 9 (f), (g) and (h) went into effect there were 1840 representation cases pending before the Board and 1481 unfair labor practice cases, including the instant one, in which charges had been filed but complaints had not yet issued. The Board and the General Counsel were of the opinion that Sections 9 (f), (g) and (h) applied to these pending cases[3] and that, consequently, compliance by the petitioning and charging organizations was necessary before further administrative proceedings could be undertaken.[4] To prevent a complete breakdown

[3] *Rite-Form Corset Co., Inc.*, 75 N. L. R. B. 174; *Myrtle Desk Co.*, 75 N. L. R. B. 226; *Colonial Radio Corp.*, 75 N. L. R. B. 228; National Labor Relations Board, 13th Annual Report, 1948, p. 22; compare *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498.

[4] The Board was also required to determine what effect, if any, was to be given to Sections 9 (f), (g) and (h) in cases where complaints had already issued on charges filed by labor organizations and the cases were pending either before the Board or the courts. The Board concluded that to effectuate the policy of Congress it would, in its administrative discretion, make its orders to bargain conditional upon compliance by the charging union with Sections 9 (f), (g) and

in the administration of the statute, the Board and the General Counsel were thus required to make an immediate administrative determination regarding basic minimum requirements under Sections 9 (f) and (h); to establish administrative machinery to facilitate compliance by labor organizations which desired to meet the standards which Congress had laid down; and, as speedily as possible, to determine for each such labor organization whether compliance had in fact been achieved.[5]

On August 19, 1947, the Board promulgated rules and regulations[6] governing compliance with Sections 9 (f), (g) and (h), and established an Affidavit Compliance Branch charged with the function of accepting and inspecting information and affidavits, and making compliance determinations pursuant to the rules and regulations and the administrative rulings of the Board and the

(h) (*Marshall & Bruce Co.*, 75 N. L. R. B. 90), and that it would recommend to the Courts of Appeals that decrees entered after the effective date of the Act, enforcing Board bargaining orders, be similarly conditioned (*National Labor Relations Board* v. *Brozen*, 166 F. 2d 812 (C. A. 2); *United Steelworkers of America* v. *National Labor Relations Board*, 170 F. 2d 247 (C. A. 7), affirmed, 339 U. S. 382).

[5] Substantially all of the first Board and court determinations under the new Act involved issues arising out of Sections 9 (f) and (h). National Labor Relations Board, *Thirteenth Annual Report* (Gov't Print. Off., 1948), pp. 21–25, 48–49.

[6] N. L. R. B. Rules and Regulations, Series 5, Section 102.13; 12 Fed. Reg. 5656.

General Counsel. Similar functions, including inspection and investigation of information supplied, were to be performed in the Board's Regional Offices.

Since it was impossible for many labor organizations to comply with Sections 9 (f), (g) and (h), before the effective date of the Act, the Board and the General Counsel decided to grant a twenty-day period of grace before dismissing petitions and charges on grounds of noncompliance.[7] This period was subsequently extended to October 31, 1947, for all unions which requested such extension.[8] Regional Directors were empowered to grant further extensions, upon request, to unions which, before October 31, had taken affirmative steps to come into compliance.[9]

In addition to other matters requiring interpretation, the Board and the General Counsel were required to determine generally the identity of persons subject to the affidavit requirements of Section 9 (h), and the evidence upon which the agency could rely as showing that the labor

[7] Daily Labor Report, August 20, 1947, No. 163, p. A–1, A–2; teletype August 20, 1947, from General Counsel to all directors of N. L. R. B. regions and sub-regions.

[8] Daily Labor Report, September 19, 1947, No. 184, p. A–1, teletype September 9, 1947, from General Counsel to Directors of N. L. R. B. regions and sub-regions.

[9] Teletype October 29, 1947, from General Counsel to all Directors of N. L. R. B. regions and sub-regions: See Daily Labor Report, October 30, 1947, No. 213, p. A–10 for illustrations of the exercise of this authority.

organizations had furnished to the Secretary of Labor and disseminated among their membership the information contemplated by Sections 9 (f) and (g). As to information which the statute contemplated that labor organizations would file with the Secretary of Labor, the Board and the General Counsel determined to accept as proof of compliance appropriate certificates which the Secretary of Labor would issue to the organizations. Proof of distribution of such material to the union's members, however, was required to be made to the Board.[10] Because of administrative difficulties which the Board and the General Counsel envisioned would result from any other interpretation, they construed the term "officer" in Section 9 (h) as applying only to persons denominated "officers" in the constitutions or bylaws of labor organizations.[11]

After the Board and the General Counsel had made these and similar preliminary determinations, the Affidavit Compliance Branch, to facili-

[10] N. L. R. B. Rules and Regulations, Series 5, Section 102.13, 12 Fed. Reg. 5656.

[11] Daily Labor Report, August 19, 1947, No. 162, p. A-1; Letter G. C. (Field) No. 2, August 19, 1947, p. 2. The Board and the General Counsel subsequently changed this interpretation and promulgated a definition of the word "officer" designed to prevent unions from evading the provisions of Section 9 (h) by not designating as officers in their constitutions and bylaws persons performing the functions ordinarily performed by officers, National Labor Relations Board Rules and Regulations, Series 6, Section 102.13, 16 Fed. Reg. 1934, 1938; National Labor Relations Board, *Fifteenth Annual Report* (Gov't Print. Off., 1951), pp. 20–22.

tate compliance, printed and distributed to unions a booklet called "A Guide For Labor Organizations," which describes the procedures and forms established by the Board and the Department of Labor for complying with the filing requirements. Proper forms were made available at regional offices, and in the main the mechanics of locals' compliance were handled with the appropriate regional office. Forms published by the Board for this purpose include (1) the non-Communist affidavit,[12] (2) a certificate of distribution of financial data,[13] (3) a certificate of union officers,[14] and (4) a certificate of intent to remain in compliance.[15] The Department of Labor published a form for furnishing the required financial information.[16] When this latter form is accepted by the Secretary of Labor, a letter certifying that fact is sent to the Union, which in turn sends a copy to the Affidavit Compliance Branch of the Board.[17]

When the material required by Sections 9 (f), (g) and (h) is initially filed with the regional director, a careful examination of the forms and their contents is made by the regional office. An

[12] Form N. L. R. B.–1081, in "A Guide for Labor Organizations," at p. 18.

[13] Form N. L. R. B.–1085, in *Id.*, at p. 15.

[14] Form N. L. R. B.–1080, in *Id.*, at p. 17 (now superseded by Form N. L. R. B. 3054).

[15] N. L. R. B. Pattern No. 37, in *Id.*, at p. 16.

[16] Form No. 44–R700, in *Id.*, at pp. 12–13.

[17] In *Id.*, at p. 14.

investigation may be made if the regional director is not satisfied with the certificate of distribution of financial data. In the case of non-Communist affidavits, an administrative investigation is made to determine whether all officers listed in the union's constitution and by-laws have filed affidavits.[18] Incorrectly prepared reports or affidavits are rejected and follow-ups on them are required. When all the documents are finally ready for filing they are sent to the Affidavit Compliance Branch in Washington, D. C., and the regional office retains the information on separate records.

Virtually at the outset a major problem of statutory policy arose. On August 19, 1947, the former General Counsel announced that, in his opinion, unless officers of the C. I. O. and A. F. L. filed non-Communist affidavits, international unions and locals affiliated with or forming constituent units of such international unions, which were affiliated with either of these federations, would not be able to invoke the processes of the Board.[19] Under this ruling, although the officers of local and international unions that had filed charges or petitions complied with Sections 9 (f), (g) and (h), the petitions and charges could not be processed unless and until the federations with which they were affiliated also complied.

[18] See amendments to Section 101.3 and 102.13 of Rules and Regulations, effective January 1, 1950, 29 CFR, Cum. Pocket Supp., p. 11, and note 11, p. 9, *supra*.

[19] Daily Labor Report, No. 162, August 19, 1947, p. A-1.

Subsequent to the former General Counsel's announcement, the A. F. L. Executive Council issued a statement that its officers would refuse to sign the affidavits.[20] The officers of the C. I. O. also refused to file. Thus, under this interpretation, no further proceedings could be taken in substantially all of the more than 1,800 representation cases and 1,400 unfair labor practice cases in which complaints had not yet been issued.[21] All future petitions or charges filed by labor organizations affiliated with one of the major federations would suffer the same fate. Under the former General Counsel's ruling, compliance by local and national and international unions with Sections 9 (f), (g) and (h) would be fruitless to avail those unions of the benefits of the Act, so long as the officers of the federation with which they were affiliated refused to comply.[22]

On August 28, 1947, the Board's Regional Director for the Fifth Region (Baltimore, Maryland), following the policy of the former General Counsel, dismissed a petition for certification which had been filed prior to the effective date of the Act by a local union affiliated with

[20] Daily Labor Report, No. 179, September 12, 1947, p. A–1.

[21] During the fiscal year July 1, 1946, to June 30, 1947, 84.3% of all representation petitions and 84.7% of all unfair labor practice charges filed with the Board were filed by unions affiliated with the A. F. L. or C. I. O. National Labor Relations Board, 12th Annual Report, 1947, Appendix A, p. 67.

[22] For example, John L. Lewis, then an officer of the A. F. L., publicly announced that he would refuse to sign the affi-

the International Brotherhood of Electrical Workers, on the ground that although officers of the Local and of the International had filed affidavits, the officers of the A. F. L., with which the International was affiliated, had not. The Union appealed administratively to the Board from this dismissal of its petition,[23] and the Board, after carefully considering the language, legislative history and objectives of Section 9 (h), concluded on October 7, 1947, that the former General Counsel's interpretation was erroneous. *Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. 11.[24]

The Board found that the words "*national or international* labor organization," in "ordinary labor relations parlance * * * have a definite, and almost technical, meaning," which does not include "parent federations such as the A. F. L. or the C. I. O. within its meaning." 75 N. L. R. B., at 13–14. The Board therefore concluded that "Congress could not have deliberately intended" by its use of this phrase in Sections 9 (f), (g) and (h), "to include the two great national federations within

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davit. This made it futile for all local and national unions affiliated with the A. F. L. to comply. Daily Labor Report, September 19, 1947, No. 184, p. A–1.

[23] The appeal was taken pursuant to N. L. R. B. Rules and Regulations, Series 5, Section 102.63; 12 Fed. Reg. 5656.

[24] The former General Counsel immediately announced that he deemed himself bound by the Board's decision. Daily Labor Report, October 7, 1947, No. 196, p. A–1.

its meaning." The Board further found that the problems which gave rise to enactment of the statute, and the methods selected by Congress for dealing with those problems, did not require that the A. F. L. and C. I. O. be deemed to have been included. The Board pointed out (75 N. L. R. B., at pp. 15–16):

> * * * We must assume that Congress intended to effectuate the policies of the Act by the most practical means available. Under the Regional Director's ruling, if one officer of the A. F. L. or C. I. O. fails to comply, not a single complying local or international union within that federation can derive any benefit from its own clean hands. In consequence, there being no conceivable advantage to such unions in bothering to comply with Section 9 (h), they would be no better off than labor organizations that might be unable to comply because of the actual presence of Communist officers. The latter would be under no pressure to stand up in the spotlight and be counted; the individual members of these unions, in turn, would lose all incentive to eliminate such officers in order to enjoy the fruits of compliance. And employers would find the Board's machinery unavailable to handle controversies which, though normally brought to our attention by labor organizations, require peaceful resolution for these employe[r]'s own sake. Nothing, it seems to us, could play more readily into the hands of dissension-seeking Communist

leadership. We cannot believe that Congress intended any such paradoxical result.[25]

At the end of September, 1947, shortly before the Board's announcement of its decision in the *Virginia Broadcasting* case, only 837 local and 63 national and international unions had come into compliance. By the end of October these figures had increased to 2,395 and 110, respectively, By the end of the year, 3,410 locals were in complete or incomplete compliance.[26]

C. THE BOARD'S COMPLAINT AND PROCEEDINGS THEREON

One of the unions which seized the opportunity to qualify for access to the Board's processes was

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[25] The Board has adhered to its ruling in *Northern Virginia Broadcasters* in an unbroken line of decisions, *Ohio Oil Co.*, 92 N. L. R. B. No. 236, 27 L. R. R. M. 1288; *Southland Manufacturing Co.*, 91 N. L. R. B. No. 38, 26 L. R. R. M. 1579; *Reynolds & Manley Lumber Co.*, 90 N. L. R. B. No. 289, 26 L. R. R. M. 1438; *Rubin Bros. Footwear Inc.*, 91 N. L. R. B. No. 1, 26 L. R. R. M. 1454; *J. H. Rutter-Rex Manufacturing Co.*, 90 N. L. R. B. No. 15, 26 L. R. R. M. 1170; *Goodyear Rubber Sundries, Inc.*, 92 N. L. R. B. No. 208, 27 L. R. R. M. 1253; *Metropolitan Life Insurance Co.*, 90 N. L. R. B. No. 129, 26 L. R. R. M. 1294; *Bethlehem Steel Co.*, 89 N. L. R. B. No. 33, 25 L. R. R. M. 1564; *Burruss Timber Products, Inc.*, 87 N. L. R. B. 1561; *Anchor Rug Mill*, 85 N. L. R. B. 764; *Chesapeake and Potomac Telephone Co. of Virginia*, 82 N. L. R. B. 810; *United States Gypsum Co.*, 81 N. L. R. B. 310; and *McGraw-Curran Lumber Co.*, 79 N. L. R. B. 705.

[26] All compliance figures are from the records of the Affidavit Compliance Branch. The term "incomplete compliance" denotes the status of unions which have attempted to come into compliance but have made technical errors in the required documents or their submission.

the Textile Workers Union of America, CIO, the Union here involved. It came into compliance on October 20, 1947, less than a month after announcement of the Board's position in the *Northern Virginia Broadcasters* case, and has remained in compliance to the present time. The C. I. O. did not comply until December 22, 1949; the A. F. L. came into compliance in November, 1947.[27]

On January 10, 1949, the former General Counsel, having determined administratively that under the Board's construction of Section 9 (h) the charging union was in full compliance, issued a complaint on the basis of the Union's charge of September 13, 1947. Following the usual proceedings under Section 10, the Board, rejecting respondent's contention that the Union's

[27] Under the Board's ruling, compliance by the C. I. O. and A. F. L. with Sections 9 (f), (g) and (h) is of significance only on those rare occasions in which the C. I. O. or A. F. L. itself seeks certification or files a charge or where it exercises the same control over the petitioning or charging union which a national or international union would. In those cases the Board requires compliance by the federation with Sections 9 (f), (g) and (h), as a condition precedent to the petitioning or charging union's access to the Board's facilities, on the ground that when a federation acts as an international union it must comply with the requirements imposed on national or international unions by those sections. *American Optical Co.*, 81 N. L. R. B. 453; *American Laundry Machinery Co.*, 81 N. L. R. B. 534; Compare *S. W. Evans & Son*, 75 N. L. R. B. 811.

majority status had not been properly established, found that respondent had violated Sections 8 (a) (5) and (1) of the Act, as amended, and entered a customary remedial order (R. 1–7). The Board (R. 2), like the Trial Examiner (R. (10), rejected respondent's additional contention (Tr. 40–41), that the complaint should be dismissed because the charging union, by virtue of the C. I. O.'s noncompliance, was not in compliance with Sections 9 (f), (g) and (h) at the time the complaint was issued.

On March 14, 1950, the Board filed in the court below a petition for enforcement of its order (R. 115–117). On September 2, 1950, the court handed down its opinion in which, without passing on the merits, it set aside the Board's order on the ground that federations such as the A. F. L. and C. I. O. are comprehended by the term "national or international labor organization" as used in Section 9 (h). In so holding the court below expressly stated (R. 121, 124), that it disagreed with the Court of Appeals for the District of Columbia Circuit, which had sustained the Board's construction, *West Texas Utilities Co.* v. *National Labor Relations Board,* 184 F. 2d 233, and that it agreed with the contrary view adopted by the Court of Appeals for the Fifth Circuit, *National Labor Relations Board* v. *Postex Cotton Mills,* Inc., 181 F. 2d 919.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In assuming jurisdiction, at the request of the employer, to determine whether the charging union was in compliance with Section 9 (h).

2. In holding that Section 9 (h) required officers of the CIO to sign non-Communist affidavits as a prerequisite to the issuance of the Board's complaint, although the charging union was an international union whose officers had complied with the Section.

3. In refusing to enforce the Board's order because the CIO officers had not filed non-Communist affidavits at the time the complaint issued.

SUMMARY OF ARGUMENT

I

The court below set aside the Board's order on the sole ground that the international union, on whose charge the Board's complaint issued, was not in compliance with the provisions of Section 9 (h) of the Labor Management Relations Act. It is undisputed that although the officers of the international union had filed the non-Communist affidavits required by that section, the officers of the C. I. O., with which the international was affiliated, had not. The court, rejecting the Board's contrary construction of the Act, held that the failure of the C. I. O. officers to file prevented the charging union from being in compliance.

Before this Court can reach that question, we believe it is necessary for it to consider a fundamental issue as to the scope of the judicial function in reviewing decisions of the Board. In our view, the question whether a charging union has complied with the provisions of Section 9 (h), and of the cognate provisions of Section 9 (f) and (g), is not litigable before the Board or in the courts on review of a Board decision. This conclusion, we believe, is required by the structure of the Act, its legislative history, the practical consequences of permitting such issues to be litigated, and the lack of any legal interest in the employer to litigate them.

A. The Act contemplates that decisions as to compliance will be made administratively by the General Counsel, the Board, and the Secretary of Labor prior to the institution of formal Board proceedings in either representation or complaint cases. It prescribes no procedure, formal or informal, to be followed in making such determinations. It makes no provision for notice or hearing to either the labor organization affected or the employer named in the petition or charge. Decisions as to compliance are thus of an entirely different character than those decisions of the Board which are required by Congress to be made after notice and hearing and for which judicial review was expressly provided. Indeed, it is clear that a labor union determined not to be in compliance would have no opportunity for re-

viewing that determination; it would be anomalous to afford the employer any greater right.

This conclusion is reinforced by consideration of the nature of procedings, like the present, to remedy unfair labor practices, and the relationship of questions of compliance to those proceedings. It is clear that questions of compliance do not affect the employer's substantive obligations under the Act or the Board's jurisdiction to redress violations of those obligations. Sections 9 (f), (g) and (h) do not purport to modify the duties or liabilities imposed on employers by Section 8. They do not preclude the Board from proceeding against the employer on charges filed by anyone other than a non-complying union. Since the union's non-compliance does not relieve the employer of his substantive obligations, it would be anomalous to permit the employer to put questions of compliance in issue in an unfair labor practice proceeding. The issue in such a proceeding is ordinarily confined to the question whether the employer has engaged in the unfair labor practice charged in the complaint. Indeed, in those few instances in which Congress intended to make preliminary determinations of the Board reviewable in unfair labor practice proceedings, it expressed that intention explicitly.

Congress undoubtedly had power thus to make administrative determinations of the fact of compliance conclusive. *Switchmen's Union* v. *Na-*

tional Mediation Board, 320 U. S. 297, 303. And the history of the Act, its structure, and the delicacy of the problems with which it deals, make it clear that "Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate," *Amazon Cotton Mill Co.* v. *Textile Workers Union,* 167 F. 2d 183, 186 (C. A. 4).

B. The Board's conclusion that issues of compliance were not to be the subject of proof and controversy in representation or unfair labor practice proceedings was explicitly called to the attention of Congress by the Joint Committee on Labor Management Relations established pursuant to Section 401 of the Taft-Hartley Act to investigate and report to Congress (Section 402 (7)) on the "administration and operation of existing Federal laws relating to labor relations." In so doing, the members of that committee expressly approved the Board's conclusion as tending to avoid intolerable delays in Board proceedings. Indeed, the history of the Act reflects a strong legislative concern that the requirements of Sections 9 (f), (g) and (h) should not so operate as to delay proceedings of the Board. It was for this reason that Congress rejected the original proposal which would have barred unions from use of the Board's facilities if any of their officers were in fact Communists, and substituted the much simpler requirement of a non-Communist affidavit.

The legislative history of the Act also makes it clear that the financial statements which unions ~~and~~ are required to furnish by Section 9 (f) were intended to be confidential and were to be made available only to union members and appropriate governmental officials. That expressed intention clearly shows that Congress did not contemplate that an employer would have any right to litigate, before the Board or in the courts, questions of a union's compliance with Section 9 (f). And since Sections 9 (f) and (h) are directly parallel, the same conclusion follows as to Section 9 (h).

C. To permit litigation of issues of compliance would create innumerable opportunities for delay in Board proceedings. The number of issues which could be raised by employers and as to which evidence would have to be taken and argument had before both the Board and the courts if compliance questions could be litigated is legion. For example, there could be innumerable contentions as to who were in fact and in law the "officers" of the charging union and of any national or international labor organization with which it was affiliated. Many questions could also be presented as to the identity of the organizations with which the charging union was affiliated. The range of issues which could arise under Sections 9 (f) and (g) is even greater. Employers might seek to contest the accuracy of the financial information submitted by the union or the soundness of the accounting methods used

in preparing financial statements. And, since the Act requires that the union submit its financial information to all of its members, employers might seek to show that any one of the several hundred or thousand union members had failed to receive the report, or that the method of distribution adopted by the union was not adequate. Finally, it should be noted that, as a practical matter, compliance issues arise not once but continuously throughout the Board's proceedings. To permit litigation of compliance at all such stages would make a merry-go-round of the Act.

D. The conclusion that issues of compliance were not intended to be litigable is reinforced by the fact that an employer has no legal interest in those issues. As we have pointed out, the Act does not purport to immunize or excuse unfair labor practices in cases where a non-complying union is involved. The legislative history makes it clear that Sections 9 (f), (g) and (h) were not adopted for the benefit of employers, but rather for the benefit of union members and the public generally. If in some cases employers may escape legal responsibility by reason of the union's non-compliance, that result is purely fortuitous and, indeed, inconsistent with the Act's fundamental objective of preventing unfair labor practices. In such circumstances it is clear that Congress cannot be taken to have conferred on

employers any legal rights which they have standing to assert as a defense to unfair labor practice proceedings. Compare *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *Stark* v. *Wickard*, 321 U. S. 288, 306.

II

If it be assumed, however, that the issue whether the charging union was in compliance is properly before this Court, we believe it clear that the Board's decision of the question of statutory policy involved should not have been overturned by the court below. Before considering in detail the statutory language, its history and purpose, we think it important to point out that the Board's construction of the Act in this respect was called in the most emphatic way to the attention of the Congress which enacted it. The question was the subject of intense public controversy between the former General Counsel and the Board, the former General Counsel taking the view adopted by the court below and the Board taking the contrary view. The Congressional "watch dog" committee, established pursuant to Section 401 of the Act, discussed in detail in its first report the Board's position and the reasoning advanced by the majority of the Board. Although criticizing some aspects of the administration of the Act, it voiced no criticism of the Board's decision on this issue and concluded its report with the observations that "the Act is being

well administered," and that in the "situations to which various provisions of the new law have been applied," "the law has adequately provided a remedy for the abuses which Congress sought to correct." This clear approval of the Board's decision expressed to the Congress by which the Act had been passed by a committee charged by the Act with reporting to Congress on its administration, is entitled, we believe, to the greatest weight in considering whether the Board's construction correctly reflected the intention of the framers of the Act.

A. The Act calls for the submission of affidavits by each officer of the charging labor organization and "the officers of any national or international labor organization of which it is an affiliate or constituent unit." The phrase "national or international labor organization" has a well settled meaning in the field of labor relations; it applies to the great autonomous national and international unions which are the basic units of the labor movement and which may or may not be affiliated with a federation such as the A. F. L. or C. I. O. Thus, for example, the *Handbook of American Trade Unions,* U. S. Department of Labor, Bureau of Labor Statistics Bull. No. 618 (1936 ed.), p. 49, states that "Structurally the American Federation of Labor continues to be what it was at its inception—a federation of autonomous *national* and *international organizations* of workers in various crafts, trades and industries."

[Emphasis added.] Accordingly, the Board, basing its decision on its own knowledge and experience, and its familiarity with the literature in the field, held that the accepted use of the statutory terms was one which excluded federations such as the A. F. L. and C. I. O.

The legislative history lends support to this conclusion. It indicates that the concern of Congress was with the existence of Communist control over those bodies which participated in collective bargaining and were empowered to call strikes—powers and functions which are exercised by locals and by national and international unions, but not by the federations. Indeed, if it were to be assumed that Congress did not use these terms in the sense in which they have acquired an established meaning in the labor field, but meant them rather to apply to any body, national or international in scope, with which labor unions are affiliated, the result would be that the Act would require, as a condition to a union's eligibility to avail itself of the Board's processes, that non-Communist affidavits be filed by the officers of such organizations as the World Federation of Trade Unions and the International Labor Organization—a patently absurd result.

B. The Board's construction will tend to effectuate the purpose of the Act. The concern of Congress was with the power of Communists in those organizations which have direct control over the calling of strikes. The organizations

which have that power and control are the local unions and their national or international parents and not the federations. Moreover, Congress' scheme was to rely on the incentive of union members to oust from office those officers who would not file the requisite affidavits. Members of local unions can accomplish this objective with respect to officers of their locals and to their national or international officers, but not with respect to officers of federations, for they are not even members of the federation and have no power to vote, either in person or through their local delegates, for or against particular federation officers. Moreover, to require the filing of affidavits by officers of the federation would have meant that so long as one federation officer refused to file, none of the local and national or international unions affiliated with that federation could have utilized the Board's services at all, unless and until the international seceded from the federation or the federation expelled those international unions whose officers refused to file affidavits. Unless and until this happened, officers of local or national and international unions would escape the pressure which Congress clearly intended to bring to bear on them.

C. Accordingly, we believe the Board's construction correctly reflects the legislative intention. Even if the matter were more doubtful than it is, we believe that that construction should stand unless it can be said to be clearly unrea-

sonable. The question at issue is peculiarly one which calls for the Board's expert knowledge and for the Board's informed judgment as to the practical consequences in effecting the policies of the Act which might flow from any rule adopted.

III

It is not disputed that the C. I. O. officers have subsequently come into compliance. A dismissal of the present complaint would leave outstanding the original charge, on which a new and unassailable complaint could immediately issue. In such circumstances, we suggest that waste motion can properly be avoided by a holding that the subsequent compliance of the C. I. O. has cured any defect which might initially have existed.

ARGUMENT

INTRODUCTION

The court below set aside the Board's order on the sole ground that the Board lacked authority to issue the complaint on which the order was based. Respondent's challenge to the Board's authority to issue the complaint was based upon its contention that the charging union had not complied with Section 9 (h) at the time the complaint was issued, and that the Board's contrary determination was incorrect. In reviewing and sustaining this contention the court below assumed without discussion that the Board's determination that a charging labor organization has complied with Sections 9 (f), (g) and (h)

is subject to judicial review at the instance of an employer in an unfair labor practice proceeding based upon charges filed by such organization. We submit that this assumption, which underlies the action of the court below in setting aside the Board's order, warrants careful examination. Since the issue concerns the jurisdiction of the courts and the proper exercise of the judicial function in reviewing decisions of the Labor Board, it is one which we believe must be decided by this Court before it can reach the further question of whether the Board's determination was correct. Compare *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297; *Oklahoma* v. *Civil Service Commission,* 330 U. S. 127, 134–135. See also, *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 412.

It is our view that Congress intended that questions of compliance with those provisions should be determined by the General Counsel and the Board in their administrative capacities, and that these administrative determinations should be final and not subject to judicial review. In Point I of this brief, we shall discuss the considerations which we believe require that result. In Point II we shall argue that, assuming the matter to be judicially reviewable, the Board was correct in deciding that compliance by the C. I. O. officers with Section 9 (h) is not a prerequisite to issuance of a complaint based on a charge of a local, national, or international union affiliated with the C. I. O.

I

THE ADMINISTRATIVE DETERMINATION THAT A MOVING LABOR ORGANIZATION HAS COMPLIED WITH SECTIONS 9 (f), (g) AND (h) IS NOT SUBJECT TO JUDICIAL REVIEW AT THE INSTANCE OF AN EMPLOYER IN AN UNFAIR LABOR PRACTICE PROCEEDING

A. *The structure of the Act establishes that Congress intended compliance determinations to be made administratively, and that it did not intend to subject such determinations to litigation in representation or unfair labor practice proceedings*

Sections 9 (f), (g) and (h) are procedural amendments to the National Labor Relations Act. They establish conditions which must be satisfied by labor organizations seeking to utilize the machinery of the Act for the investigation of questions concerning representation or the remedying of unfair labor practices. Responsibility for interpreting Sections 9 (f), (g) and (h), for facilitating compliance by labor organizations, and for determining whether a moving labor organization has satisfied the conditions of Sections 9 (f), (g) and (h), was vested by Congress in administrative officials: the Board, the General Counsel, and the Secretary of Labor. The Act contemplates that their responsibilities in this sphere shall be exercised prior to the institution of proceedings in either representation or complaint cases. Section 9 (h) provides, for example, that unless the requisite affidavits are "on file with the Board," "[n]o investigation shall be made by the

Board of any question * * * concerning the representation of employees * * * and no complaint shall be issued." Sections 9 (f) and (g) likewise contemplate that determinations as to compliance will be made prior to the institution of representation or complaint proceedings.

The statute contains no provision for any procedure, formal or informal, to be followed by the Secretary of Labor, the General Counsel or the Board in determining whether affidavits and information filed by labor organizations pursuant to Sections 9 (f), (g) and (h) satisfy their requirements. There is no provision for notice or hearing to the labor organization affected. Similarly there is no requirement that the Board or the General Counsel afford a hearing to the employer named in the petition or charge before determining that the moving labor organization has complied with these provisions. Congress evidently contemplated that the judgment of the Board and the General Counsel as to whether a labor organization had complied would be exercised on the basis of administrative investigation only.

Determinations of this character are thus entirely different from decisions of the Board, required by Congress to be made after hearing and upon a record, that a question concerning representation exists (Section 9 (c) (1)), or that an unfair labor practice has been committed (Section 10 (c))—quasi-judicial decisions which Congress

in Sections 10 (e) and (f) has authorized the courts to review. Insofar as the structure of the Act is concerned, compliance determinations not only precede, but are entirely separate from, proceedings in representation and in unfair labor practice cases. It would accordingly seem that in an unfair labor practice proceeding, such as the present, determinations as to compliance with Sections 9 (f), (g) and (h), which are properly made prior to the institution of formal proceedings, without notice or hearing, and upon the basis of administrative investigation only, may not be considered a part of the record before the reviewing court.

Congress made no provision for judicial review of determinations as to compliance even at the instance of labor organizations directly affected by them. Thus, where the Board refuses to proceed with investigation of a petition for certification filed by a labor organization, or the General Counsel refuses to issue a complaint on charges filed by such organization, because it has been administratively determined that the organization was not in compliance with Sections 9 (f), (g) or (h), it has uniformly been held that the labor organization may not secure judicial review of that determination. *Lincourt* v. *National Labor Relations Board,* 170 F. 2d 306 (C. A. 1); *Fay* v. *Douds,* 172 F. 2d 720 (C. A. 2); *Fitzgerald* v. *Douds,* 167 F. 2d 714 (C. A. 2);

Haleston Drug Stores v. *National Labor Relations Board*, 186 F. 2d —, 27 L. R. R. M. 2401 (C. A. 9); *General Drivers, Chauffeurs, and Helpers* v. *National Labor Relations Board*, 179 F. 2d 492 (C. A. 10).[28]

The fact that the labor organizations directly affected by a decision as to compliance are denied any hearing or right to judicial review in connection with determinations by the Board and the General Counsel that they have not complied with Sections 9 (f), (g) and (h), is a strong indication that employers were not intended to be given any right to challenge such determinations in representation or unfair labor practice

[28] A few actions have been maintained to enjoin enforcement of Section 9 (h) on the ground of unconstitutionality, *American Communications Ass'n* v. *Douds*, 339 U. S. 382; *National Maritime Union* v. *Herzog*, 78 F. Supp 146 (D. D. C.); *Wholesale and Warehouse Workers' Union* v. *Douds*, 79 F. Supp. 563 (S. D. N. Y.). The sole issue in these cases was the constitutional one, there being no dispute as to the fact of non-compliance.

In *United Steelworkers* v. *National Labor Relations Board*, decided together with *American Communications Ass'n* v. *Douds*, *supra*, this Court considered the constitutional issue on an appeal by the union from a Board order, based on a complaint issued prior to the Taft-Hartley amendments, which conditioned its direction to the employer to bargain on compliance by the union with Section 9 (h). No issue as to the fact of non-compliance was presented. Moreover, in a case in which the Board or General Counsel refused to issue a complaint or investigate a petition on the ground of non-compliance, no appeal by the union would lie because there would be no final Board order of the type reviewable under Section 10 (f). See cases cited in the text.

proceedings before the Board or the courts. As we shall show, *infra*, pp. 46–48, Congress was aware that the mere making of administrative determinations as to compliance by the Board and the General Counsel would itself delay the prosecution of unfair labor practice cases and the resolution of questions concerning representation. Congress desired to minimize the delay so far as possible, and to this end, it sought to simplify and narrow the administrative task of making such determinations, *infra*, pp. 45–48. If employers were permitted to raise and to litigate questions of compliance in the course of representation or unfair labor practice proceedings, these proceedings might be clogged with ancillary issues, and the objective of Congress to prevent compliance matters from indefinitely delaying the resolution of such cases on their merits would be frustrated.

In the instant case the employer attempts to litigate questions of compliance in an unfair labor practice proceeding. Consideration of the issues normally open in such a proceeding, and the lack of relation of questions of compliance to those issues, strongly indicates the inappropriateness of such an attempt.

It should be emphasized at the outset that questions of the union's compliance with Sections 9 (f), (g) and (h) in no way affect the employer's substantive obligations under the Act or the

Board's jurisdiction to redress violations of these obligations, but go only to the union's standing to utilize the Board's facilities. *National Labor Relations Board v. Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 845 (C. A. 4). Those provisions do not, in their terms or context, purport to modify any of the duties and liabilities imposed on employers by Section 8.[29] Congress did not, as it could easily have done, declare that interference by employers with employees' rights of self-organization (Section 8 (a) (1)) was not unlawful if those rights were exercised through a non-complying union; or that employer interference with the administration of a non-complying union was permissible (Section 8 (a) (2)); or that a discriminatory discharge of a member of a non-complying union was not unlawful (Section 8 (a) (3)); or that a refusal to bargain collectively with a non-complying union was not unlawful (Section 8 (a) (5)).[30] Indeed, noth-

[29] In this connection it should be noted that the unfair labor practice here complained of occured *prior* to the enactment of the Taft-Hartley Act. See pp. 3, 5, *supra*.

[30] The Board, in the exercise of its discretion to so frame its orders as to effectuate the policies of the Act, will not direct an employer to bargain with a union which is not in compliance with Section 9 (h) at the time of its order. In such a case its practice is to issue an order directing bargaining on condition that the union comes into compliance. E. g., *Marshall and Bruce Co.*, 75 N. L. R. B. 90, 94–6; *Inland Steel Co.*, 77 N. L. R. B. 1.

The adoption by the Board of such a practice does not amount to a modification of the employer's obligations. The order is based on a finding of unfair labor practice; it directs

ing in Sections 9 (f), (g) and (h) even refers to compliance by the union at the time of an asserted violation of the Act; they merely relate to compliance at the date of issuance by the Board of a complaint on a charge filed by a union.[31]

If Congress had intended that Sections 9 (f), (g) and (h) should modify the substantive obligations imposed on the employer it would have been an easy matter to express that intention in the draftsmanship of the Taft-Hartley amendments. For example, Section 8 (a) (5), as it stood prior to the amendments, provided that it should be an unfair labor practice for an employer

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the employer to bargain, subject to a condition which the union has unilateral power to remove by coming into compliance. (For these reasons, an order so conditioned was held a final order reviewable by the employer in *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C. A. 7), certiorari denied, 336 U. S. 960; see 339 U. S. 384).

[31] The Board has held that, in some circumstances at least, it will find an unfair labor practice in a refusal to bargain at a time when the union was not in compliance, and will issue an order directing bargaining if the union has subsequently come into compliance. *New Jersey Carpet Mills, Inc.*, 92 N. L. R. B. No. 122, 27 L. R. R. M. 1114; *Alpert & Alpert*, 92 N. L. R. B. No. 127, 27 L. R. R. M. 1144. The Board has not definitively passed on the question whether, in the exercise of its administrative discretion, it will issue such an order in the case of a refusal to bargain which had been expressly based on contemporaneous non-compliance. See Memorandum for the Board in No. 466, *West Texas Utilities Co.* v. *National Labor Relations Board*, pp. 7–8.

> To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

All Congress would have had to do, had it intended to modify this obligation, was to add after "Section 9 (a)" the letters, "(f), (g) and (h)."

Indeed, when the framers of the Taft-Hartley amendments did wish to modify the employer's substantive obligations, they were careful to use clear language of exculpation. Thus prior to the amendment, Section 8 (a) (3) had read in pertinent part:

> It shall be an unfair labor practice for an employer * * * By discrimination * * * to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act * * * shall preclude an employer [from making a closed shop agreement with a union] if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

To this wording the amendment added in pertinent part:

> and (ii) if * * * the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: * * *

Thus, the pattern of the legislation as a whole demonstrates that when Congress intended to

modify employers' duties and rights under the Act, it used clear language, keyed directly to Section 8 (a), to accomplish that purpose.

Moreover, it is clear that Sections 9 (f), (g) and (h) do not bar the Board from proceeding against an unfair labor practice upon a charge filed by any person or organization other than a non-complying union. Although the Act requires a charge precedent to issuance of a complaint, it in no way limits the persons by whom such a charge may be made. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 17. Thus, a charge could have been made in this case by some other person, and indeed even by a member of the assertedly non-complying union (*National Labor Relations Board* v. *Augusta Chemical Co.*, 186 F. 2d, 27 L. R. R. M. 2350 (C. A. 5); *Fredrica Clausen* d/b/a *Luzerne Hide & Tallow Co.*, 89 N. L. R. B. No. 119, 26 L. R. R. M. 1076). There can be no doubt that on such a charge the Board could have proceeded against the unfair labor practice charged. That Congress, while imposing a barrier where charges are filed by non-complying unions, left open other avenues of relief against the same employer conduct clearly indicates that the provisions of Sections 9 (f), (g) and (h) were in no way intended to change the substantive law applicable in unfair labor practice proceedings, or to affect the obligations imposed on employers by Section 8 of the Act.

Since the issue of compliance does not go to the question whether an unfair labor practice has been committed, it would be anomalous to permit it to be litigated in an unfair labor practice proceeding under Section 10. The issue in such a proceeding is whether "any person named in the complaint has engaged in or is engaging in any such unfair labor practice" (Section 10 (c)). "When a Board complaint issues the question is only of the truth of its accusations." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18; *National Labor Relations Board* v. *Fulton Bag and Cotton Mills*, 180 F. 2d 68, 71 (C. A. 10). When Congress desired to authorize review of preliminary determinations which were deemed relevant to Section 10 proceedings it specifically so provided. Thus, in Section 9 (d), Congress provided that when a Board decision in an unfair labor practice case was based in whole or in part upon a prior representation proceeding the record in the representation proceeding was to be included in the transcript of the "entire record" required to be filed in the reviewing court, and that the "decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript." In such cases the representation proceeding is relevant to the issue of unfair labor practice because it determines the union with

which the employer is obligated by the Act to bargain in good faith. Indeed, as we have noted, *supra*, p. 37, the obligations of Section 8 (a) (5) are expressly made subject to the provisions of Section 9. On the other hand, Congress did not provide that compliance determinations by the Board or the General Counsel, or the administrative investigations or statutory interpretations upon which such determinations are based, should be included in the record in representation proceedings under Section 9, or unfair labor practice proceedings under Section 10. Congress thus distinguished matters going to the substance or existence of the employer's obligation from matters such as union compliance with Sections 9 (f), (g) and (h), which go only to the standing of the union to invoke the facilities of the Board. The former could be litigated before the Board and the courts; the latter issues were not to be litigable.

In an analogous situation the courts have uniformly held that collateral issues could not be litigated in unfair labor practice cases. A rider to an appropriation act of 1944 (Act of July 12, 1943, 57 Stat. 494, 515) provided that no part of the appropriation should be used in "connection with a complaint case arising over" a labor-management agreement which had been in existence for three months or more prior to filing of the charge. The courts uniformly sustained the Board's position that an objection to an unfair labor practice order founded on this pro-

vision "is not within our powers of review under § 10 (e) of the Act, 29 U. S. C. A. § 160 (e), or one that respondent may raise, under *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 478–480 * * * and other cases." *National Labor Relations Board* v. *Elvine Knitting Mills*, 138 F. 2d 633, 634 (C. A. 2). Accord: *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 58 (C. A. 4), certiorari denied, 321 U. S. 795; *S. H. Camp & Co.* v. *National Labor Relations Board*, 160 F. 2d 519, 521 (C. A. 6); *National Labor Relations Board* v. *Thompson Products*, 141 F. 2d 794 (C. A. 9).

There can be no doubt that it was in the power of Congress to make the Board's determination of the fact of compliance conclusive. In *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303, this Court gave short shrift to a similar objection:

> The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review. *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 182. Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. See *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *United States* v. *George S.*

Bush & Co., 310 U. S. 371; *Work* v. *Rives*, 267 U. S. 175; *United States* v. *Babcock*, [250 U. S. 328].

These considerations, there deemed sufficient to bar review by a person directly affected, are applicable, *a fortiori*, to a claim that matters such as this can be litigated by one who, like the employer here, has at most a collateral interest. See pp. 71–72, *infra*.

In short, we conclude, from the structure of the Act which carefully separates compliance issues from issues going to the merits of a representation or unfair labor practice proceeding; from the failure of Congress to provide for the conduct of hearings and taking of evidence with respect to compliance; and from the fact that Congress has shown consistent care in specifying those issues which were to be subject to judicial review, that questions of compliance with Sections 9 (f) (g) and (h) were not intended to be litigable before the Board or in the courts. In this connection, the observation of the Court of Appeals for the Fourth Circuit in *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183, 186, though made in response to a different contention, is entirely apposite:

> What was said by the Supreme Court in *General Committee* v. *Missouri K. T. R. Co.*, 320 U. S. 323, 332, 333, 64 S. Ct. 146, 150, 88 L. Ed. 76, with respect to the Railway Labor Act, 45 U. S. C. A. § 151 et seq.,

is applicable also to the National Labor Relations Act and the Labor Management Relations Act amending it. The Court said: "On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

B. *Congress has clearly shown that it neither contemplated nor desired litigation of compliance issues*

The Board has uniformly taken the position that questions of compliance with Sections 9 (f), (g) and (h) are to be determined by the Board and the General Counsel administratively and that issues concerning compliance may not be litigated by the parties in the course of hearings on representation or unfair labor practice questions.[31a] The Joint Committee on Labor Management Relations, established pursuant to Section 401 of the

[31a] National Labor Relations Board, *Fifteenth Annual Report.* (Gov't Print. Off., 1951) pp. 19–20, and cases there cited.

Taft-Hartley Act to investigate and report to Congress (Sec. 402 (7)) on the "administration and operation of existing Federal laws relating to labor relations" has unequivocally approved this view. In its Report, S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., 1948, p. 45, the Committee, after recommending that Section 9 (h) be amended in certain respects, declared as follows:

> The committee wishes to emphasize as strongly as possible that in any consideration of amendments to this section, great care must be given to prevent litigation of the question in Board hearings. If the parties to Board hearings are permitted to question the veracity of the affidavit, or the fact as to it having been filed, records will be hopelessly overburdened with such proof. Board hearings must be confined to evidence going into merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargaining representatives. The board recognized this principle in *Lion Oil Co.* (15–R–2264) [76 N. L. R. B. 565, 566] when it upheld the ruling of the hearing officer in his denial of the employer's motion to dismiss the petition since the record did not show the petitioning union had complied with the requirements of Section 9 (f) and (h). The Board said that compliance is clearly for the Board to determine and its official records indicated that the union had complied.

The strong emphasis placed by the "watchdog" committee on the necessity of continuing to "prevent litigation of the question [of compliance] in Board hearings" makes it clear that the Board's treatment of compliance questions as a purely administrative matter accords with the intention of Congress. In view of the character of that Committee and the purposes for which it was set up, as well as the keen Congressional interest in the Taft-Hartley Act, (see pp. 83–90, *infra*), these declarations are "persuasive evidence of the adoption by Congress of the construction given the filing requirement here in question by the Board, in the *Lion Oil Co.* case." *National Labor Relations Board* v. *Wiltse* (C. A. 6), decided March 23, 1951, reprinted as Appendix III, *infra*, at p. 164.

Indeed, the same consideration to which the Committee referred, permitting the Board to "carry out its real function of deciding unfair labor practice cases and determining bargaining representatives" without becoming bogged down in compliance matters, led the Congress which enacted Section 9 (h) to eliminate from earlier versions of the Section features which had been criticized as creating endless delays. As originally passed by both Houses, Section 9 (h) provided in substance that no labor organization should be eligible for certification as a collective bargaining representative unless its officers were not Communists or fellow travelers. This provi-

sion, which would have required the Board to ascertain as a matter of fact whether the union officers were Communists, was changed in conference so as to require only that the officers file affidavits disavowing communistic affiliations and beliefs. Explaining this change to the Senate, Senator Taft, one of the principal proponents of the Act as well as one of the Senate conferees, said (93 Cong. Rec. 6444; Legislative History of the Labor Management Relations Act, 1947, p. 1542):

> Subsection 9 (h) of the conference agreement embodies the principle of an amendment adopted when the bill was being considered on the floor of the Senate which would have prevented a labor organization from being eligible for certification if any of its local, national, or international officers were members or affiliates of the Communist Party or believed in or supported organizations advocating the overthrow of the United States Government by force or any other illegal or unconstitutional method. There was a similar provision in the House bill, although the language was somewhat different. In reconciling the two provisions the conferees took into account the fact that representation proceedings might be indefinitely delayed if the Board was required to investigate the character of all the local and national officers as well as the character of the officers of the parent body or

> federation. The conference agreement provides that no certification shall be made or any complaint issued unless the labor organization in question submits affidavits executed by each of its officers and officers of its national or international body, to the effect that they are not members or affiliates of the Communist Party or any other proscribed organization.

In answer to a query on the floor of the Senate, Mr. Taft said (93 Cong. Rec. 6447, Leg. Hist. p. 1547):

> * * * The Senate adopted an amendment which provided that no union could be certified if any of its officers were Communists. That seemed to us impracticable. With the agreement of all the conferees we provided that the union must file an affidavit that none of its officers are Communists, or whatever the language may be. Otherwise, the way it was passed by the Senate, the whole certification might be tied up for months while determination was made as to whether a man was a Communist. Today it is provided that officers shall file statements to the effect that they are not Communists. If a man who files such a statement tells an untruth he is subject to the same statute under which Marzani was convicted last week.

Again in a Supplementary Analysis of the Act submitted to the Senate on June 12, 1947 (93 Cong. Rec. 6860, Leg. Hist. p. 1625), Senator Taft explained:

> SECTION 9 (h). This provision making the filing of affidavits with respect to Communist party affiliation by its officers a condition precedent to use of the processes of the Board has been criticized as creating endless delays. It was to prevent such delays that this provision was amended by the conferees. Under both the Senate and House bills the Board's certification proceedings could have been indefinitely delayed while it investigated and determined Communist Party affiliation. *Under the amendment an affidavit is sufficient for the Board's purpose and there is no delay unless an officer of the moving union refuses to file the affidavit required.* [Emphasis supplied.]

The foregoing statements clearly reveal that Congress believed and intended that compliance determinations would be made by the Board and the General Counsel administratively. Congress acted to assure that even administrative determination of questions of compliance would not unduly prolong the resolution of questions concerning representation and the remedying of unfair labor practices. *A fortiori,* Congress did not intend to sanction litigation of compliance questions in representation and unfair labor practice hearings, after they had administratively been determined by the Board and the General Counsel. For to sanction the litigation of such issues would provide opportunities for delaying resolution of

representation and unfair labor practice issues far more serious than any delays which were likely to occur during administrative investigation. The objective of Congress in providing machinery for the resolution of questions concerning representation and the remedying of unfair labor practices, removal of causes of industrial strife, is not achieved by the mere initiation of proceedings. And the concern of Congress that initiation of these proceedings not be unduly delayed makes equally clear its concern that their completion likewise should not be unduly delayed by the litigation therein of issues concerning compliance.

To effectuate the policy of Congress as evidenced by this legislative history, the courts have held that in unfair labor practice cases the Board is not required either to allege or to prove that the charging union was in compliance with Sections 9 (f), (g) and (h) when the complaint was issued. The Board has therefore not been required to include as part of the record in an unfair labor practice proceeding its determination that the charging union had complied, or to open to attack the bases, factual or legal, upon which its determination rested. Thus, in *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 845 (C. A. 4), the court, in rejecting the view urged by the employer that in an unfair labor practice proceeding the General Counsel must allege and prove that the union was in compliance, stated:

> There is nothing in the language of the statute expressly requiring this; and if such view were to be taken, it would greatly hamper the administration of the act, since it would be incumbent upon the general counsel to show compliance, not only with the requirements as to filing affidavits but also with those requiring the giving of notice to members * * *. Surely nothing of the sort was contemplated in the passage of the statute; and it is well settled that the courts will not construe a statute in such way as to make it administratively unworkable if any other construction is possible. *Hagger* v. *Helvering,* 308 U. S. 389, 394, 60 S. Ct. 337, 84 L. Ed. 340; *Gruver* v. *Com'r,* 4 Cir. 142 F. 2d 363, 366; *Fides* v. *Com'r,* 4 Cir., 137 F. 2d 731.

Accord: *National Labor Relations Board* v. *Wiltse* (C. A. 6), decided March 23, 1951, Appendix III, *infra; National Labor Relations Board* v. *Red Rock Co.,* 186 F. 2d —, 27 L. R. R. M. 2355 (C. A. 5).

Congressional intention that compliance issues should not be litigated is shown in yet another way. As we have seen, Sections 9 (f) and (h) are parallel provisions; there is no conceivable basis on which one could be held to raise litigable issues and another not. As to the requirement of Section 9 (f) that unions submit financial reports, it is clear that Congress did not contemplate litigation. This appears from the fact that Con-

gress clearly understood that the financial reports which unions were to file under Section 9 (f) were not to be made available to the public. Senator Taft expressly so stated in explaining to the Senate the effect of Section 9 (f). He said (93 Cong. Rec. 3839, Leg. Hist. 1014; see also 93 Cong. Rec. 4284, Leg. Hist. 1150):

> Mr. President, the bill provides that unions must file financial reports on forms certified by the Secretary of Labor, and furnish the reports to all their members, and file a copy with the Secretary of Labor. *Such reports are not open to the public,* any more than corporation reports are open to the public; but they are open to inspection by the members, and they are also open to proper Government officials. *There is no special provision, but they are not specifically provided to be open to the public.* [Emphasis supplied.]

In executing its functions under Sections 9 (f) and (g) in accordance with this declared Congressional intent, the Department of Labor has issued a General Regulation (General Regulations of the Office of the Secretary of Labor, 29 CFR, Sec. 2.4 (1949)) stating that none of its officers or employees "shall make such information public, nor disclose such information to any person outside of the Department of Labor except, upon written request, to the following:"

> (1) members of a particular labor organization, or of the national or interna-

tional labor organization of which it is an affiliate or constituent unit, but only with respect to the information filed for such organizations; (2) the National Labor Relations Board or courts of competent jurisdiction in appropriate proceedings under the National Labor Relations Act, as amended by the Labor-Management Relations Act, 1947; or (3) members of Congress through the Senate Committee on Labor and Public Welfare, the House Committee on Education and Labor, or the Joint Committee on Labor-Management Relations.

To permit employers to litigate questions concerning union compliance with Section 9 (f) would be completely incompatible with this Congressional objective of not making the reports public, because the reports themselves would have to be introduced in evidence and would thereby be made available to the public. Moreover, Congress clearly understood that the reports were not to be available to employers. Without access to the reports employers lack the necessary information upon which any attack upon the accuracy or completeness of the union's compliance with the statutory requirements could be based. Clearly, had Congress intended to permit employers to challenge and to litigate the union's compliance with Section 9 (f), it would not have adopted an approach which virtually precludes such challenge. See *National Labor Relations Board* v. *Wiltse*, p. 164, *infra*.

Beyond this, Congress' division of responsibility for administering Section 9 (f) between the Secretary of Labor, the Board and the General Counsel make it apparent that Congress did not contemplate or intend that compliance issues were to be litigable. The documents and information contemplated by Section 9 (f) must be filed with the Secretary of Labor. It would seem to follow that the Secretary of Labor, not the Board or the General Counsel, was entrusted with initial responsibility for determining the form and content of the information to be filed, and the adequacy, accuracy and completeness of information. This has been the construction of the statute adopted by the Board, the General Counsel and the Secretary of Labor. The Board and the General Counsel have further assumed, in the absence of clear evidence to the contrary, that Congress could not have intended that they should act as a reviewing or revisory agency over determinations of the Secretary of Labor. Therefore, the Board and the General Counsel accept as final certificates of compliance with the filing requirements of Sections 9 (f) and (g) which are issued by the Secretary of Labor. To hold that compliance with Sections 9 (f) and (g) is litigable in unfair labor practice proceedings, however, would place in issue the administrative determinations of the Secretary of Labor. The Board would be required to determine whether the information which the Secretary certified as having

been filed with him was actually so filed, and whether the Secretary had properly construed the requirements of Sections 9 (f) and (g) and properly applied them in each particular case. Moreover, if the validity of compliance determinations by the Secretary were litigable, the Secretary would be required to defend his determinations both before the Board and in the courts. That Congress intended such results is beyond belief.

C. *To permit litigation of questions of compliance in representation and unfair labor practice proceedings would create innumerable opportunities for delay in Board proceedings and would thus tend to defeat the basic objectives of the Act*

To permit an employer to challenge in an unfair labor practice proceeding the propriety of the General Counsel's administrative determination that the charging union complied with Sections 9 (f), (g) and (h) prior to the issuance of the complaint, would open a Pandora's box of issues unrelated to the charges dealt with in the complaint, and would permit endless delay in the adjudication of those charges. Determination of compliance is not a simple matter. It requires resolution of numerous questions of fact as well as of law. If each of the subsidiary questions upon which a compliance determination rests could be called into question in an unfair labor practice

proceeding, the merits would be submerged in a welter of side issues.

Section 9 (h) alone affords endless opportunities for litigation. As we have indicated, p. 9, *supra,* the Board initially determined to treat as "officers" for the purpose of Section 9 (h) only those persons whom the union in its constitution and by-laws denominated officers. If compliance determinations were litigable, employers might have contended that all persons, regardless of their titles, who, in fact, exercised or were authorized to exercise duties and functions normally exercised by union officers, should have been required to file affidavits. The Board would have been compelled in every case to permit employers to introduce, in support of such a contention, evidence showing that persons other than those who filed affidavits actually exercised powers normally exercised by union officers. Proof and counterproof on this issue might have been adduced with respect to virtually every person performing any duties for the labor organization. Even if the Board's construction of the term "officers" were ultimately upheld, the resolution of the substantive issues in unfair labor practice cases would have been delayed indefinitely while the status of individuals as union officers was being litigated.

The Board subsequently adopted the practice of requiring non-Communist affidavits from persons other than those designated as officers by a union in its constitution, if the Board believes that their

names were omitted by the union for the purpose of circumventing Section 9 (h). If compliance issues were litigable, employers would doubtless attempt to prove that the union had omitted the names of various persons from its list of officers for the purpose of circumventing Section 9 (h), and that the Board had therefore erred in considering the union in compliance without requiring such persons to file affidavits. Hearings could be interminably delayed by proof and counterproof as to a union's motives for omitting the names of various persons from its list of officers.

Contentions of this nature could, moreover, be asserted not only with respect to the officers of the particular labor organization filing the charge, but also with respect to the officers of any national or international labor organization of which it is an affiliate or constituent unit. An illustration is provided in the Reply Memorandum filed in this Court by the petitioner in *West Texas Utilities Co. v. National Labor Relations Board*, No. 466, this Term, in which petitioner challenges the Board's determination that the A. F. L. complied with Section 9 (h) in November, 1947. In its memorandum petitioner attempts to show that the A. F. L., for the purpose of circumventing Section 9 (h), amended its constitution so as to eliminate from the category of officers various persons who had refused to file the affidavits, and that the Board therefore erred in determining that the affidavits actually filed by the persons

described as officers in the A. F. L. constitution were adequate to bring the A. F. L. into compliance. If compliance determinations were litigable, the facts concerning the alleged amendment of the A. F. L. constitution, and its purpose, would be subject to proof and counterproof in any case where compliance by the A. F. L. was deemed necessary.

Attacks upon compliance determinations could also be predicated upon allegations that the charging union was in fact affiliated with other labor organizations whose officers had not filed the affidavits, and that the Board's administrative determination that it was not so affiliated was erroneous. For example, in *National Labor Relations Board* v. *Dalton Telephone Corp.*, decided March 2, 1951 (C. A. 5), enforcing 82 N. L. R. B. 1001, the company filed a motion to remand, contending that the charging union, the Southern Federation of Telephone Workers, a regional labor organization, had not complied with Section 9 (h) both because the officers of the local union, which was a constituent unit of the charging union, had not filed the affidavits, and because, at the time the complaint was issued, the charging union was affiliated with a national labor organization whose officers had not filed. The former General Counsel had determined administratively, before issuing the complaint, that there was no local union in existence, and hence no local officers who were required to file the affidavits, and secondly, that

the regional organization was then affiliated not with the national organization referred to by the Company, but with a different national organization whose officers had filed the affidavits. The regional organization became affiliated with the national organization to which respondent referred only after the complaint had issued, and, by that time, the officers of that organization had filed the affidavits. If the compliance status of charging unions were subject to litigation all of these subsidiary determinations upon which the General Counsel's conclusion rested could be put in issue in the unfair labor practice proceeding.[31b]

In addition to these questions concerning the proper construction and application of the terms "officers" and "affiliated," many questions, among them the one which the employer seeks to raise in this case, could be presented concerning the construction and application of the term "national or international labor organization." A charging labor organization may be affiliated with numerous organizations concerned in advancing the interests of labor in various spheres, legal, political and economic. These may include not only the A. F. L. or the C. I. O., but also other groups such as the United Labor Policy Committee, International Labor Organization, In-

[31b] In the *Dalton* case the court denied the Company's "motion to remand this proceeding to the Board for further findings" because "we have found no basis for such motion" (slip op. p. 5).

ternational Confederation of Free Trade Unions, International Federation of Christian Trade Unions, Inter-American Confederation of Workers, etc. Whether one or more of these organizations should be deemed a "national or international labor organization" within the meaning of Section 9 (h), like the other questions discussed above, presents a mixed question of law and fact. To permit litigation of compliance issues would thus mean that unfair labor practice hearings could be turned into a forum for the resolution of issues concerning the structure, purposes, operating methods, etc., of each of the groups with which the particular labor organization which filed the charge is affiliated.

Indeed, if the Board's and the General Counsel's construction of Section 9 (h) in these respects could be challenged, other aspects of their administration of this provision could also be put in issue by employers in unfair labor practice proceedings. For example, employers could challenge the construction pursuant to which the Board extended beyond the effective date of the Act the period available to labor organizations for complying with this provision, *supra*, p. 8. They could argue that the Board and the General Counsel were bound to dismiss all petitions and charges pending on the effective date of the Act if the unions involved were not then in compliance.

Moreover, the language and structure of Section 9 (f), and its effect upon the issuance of complaints, is precisely the same as Section 9 (h). Hence, if compliance with Section 9 (h) were held litigable, compliance with Section 9 (f) could likewise be litigated. Litigation of compliance with Section 9 (f) could give rise to an even greater range of issues than those arising with respect to Section 9 (h).

To comply with Section 9 (f) (Appendix, pp. 142–144, *infra*) a labor organization must file with the Secretary of Labor a mass of detailed information including a copy of its constitution and bylaws, and a report showing the name of the union, the address of its principal place of business, the names of its three principal officers, the titles of the offices they hold, the amounts they receive as compensation and allowances, the names of other officers or agents whose compensation and allowances exceed $5,000, the titles of such officers, the manner of selecting all the above officers, the initiation fee for new members, and the regular dues for members. Labor organizations must also report, either separately or by reference to appropriate provisions in their constitution and bylaws, the following: any qualifications and restrictions as to membership; the procedures for the election of officers and stewards, the calling of regular and special meetings, the levying of assessments and fines, the authorization of bargaining demands, ratification of con-

tract terms, authorization for strikes, authorization for spending funds, and the audit of union financial transactions; union participation in insurance or benefit plans; and grounds and procedures for expulsion of members. In addition, a labor organization must make a financial report, and supply a copy thereof to each of its members, showing the union's total receipts for the past fiscal year, the source of such receipts, the union's total assets and liabilities as of the end of the past fiscal year, disbursements made during the fiscal year and the purpose of such disbursements. Section 9 (g) requires the labor organizations annually to file reports with the Secretary of Labor bringing the information previously supplied up to date, and to furnish the financial data to their members.

If litigation as to compliance were permissible, employers in unfair labor practice cases could raise an issue with respect to each of the separate items thus required, contending that the union had not filed with the Secretary one or more of the specified pieces of information. Beyond that, since the statute obviously contemplates that true and accurate information shall be filed, employers could contend, and introduce evidence to prove, that any one or more of the items of information supplied was, in one or more particulars, incorrect. For example, employers could contend that the union's statement of assets was grossly inaccurate because excess depreciation was taken, or because

reserves set up to meet contingent liabilities were excessive. The broad field of accounting practice, and with it the opportunity of adducing time-consuming expert testimony, would be opened up to employers.

The mere question whether the union has, as Sections 9 (f) and (g) require, furnished each of its members a copy of its financial report, offers an almost endless opportunity for litigation. If a union has 500 members, an employer would have 500 chances of finding some one of them who did not, or who is willing to say that he did not, receive a copy of the union's financial report. Even if 9 (f) were construed not to require the union actually to prove that each member received a copy of the report, but merely that it adopt a method of distribution reasonably calculated to reach each of the members, it would still be open to the employer to try to show that the method of distribution adopted by the union was not reasonable or adequate.

As the court pointed out in *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 845 (C. A. 4), to construe the Act as permitting litigation of such issues in unfair labor practice hearings would make the Act unworkable.

Finally, it should be emphasized that as a practical matter compliance has to be determined, not once, but continuously throughout the Board's proceedings. For example, Sections 9 (f) and

(h) provide that, absent compliance by the petitioning labor organization, "no investigation shall be made by the Board of any question affecting commerce concerning the representation of employees." To give effect to this provision the Board must determine not only when the petition is filed, but at each subsequent stage of proceedings: before the hearing, before the direction of election, before conducting the election, and before issuing the certification, whether the petitioning labor organization, and any other labor organization which may be seeking certification in the same proceeding, is in compliance, since each of these steps is part of the "investigation." *Rite-Form Corset Co., Inc.*, 75 N. L. R. B. 174; *Tampa Transit Lines*, 83 N. L. R. B. 1017. To do this there must be a continuous policing of compliance from day to day, because a compliance status once achieved does not necessarily continue for any definite period of time.

Gaps in time between accounting and reporting, vacancies in union office, disparity between the dates of election of local and national union officers, and many other circumstances result in frequent lapses from compliance. Illustrative are the two tables set forth in Appendix II to this brief, taken from the records of the Affidavit Compliance Branch. Table I shows the number of unions in compliance and lapsing in compliance status from month to month for the year beginning July

1948. It shows that from month to month unions previously in compliance, ranging from a low of 2,925 to a high of 8,538, for one reason or another lapsed in their compliance status. As of January 31, 1949, and February 28, 1949, there were more unions which had fallen out of compliance than were actually in compliance. As of the last day in each of the seven months beginning with December, 1948, the number of unions previously in compliance which, for one reason or another, had lapsed in their compliance represent well over half of the total (and in January and February more than the total) unions which had been in compliance at the beginning of those respective months. Particularly illustrative of this general phenomenon is the breakdown of the compliance experience of nine individual unions—chosen purely at random—reflected in Table II. An examination of Table II discloses that each of the unions listed was out of compliance with Section 9 (h) for varying periods several times in the course of a year. Thus, one union (designated in the Table as Union D) lapsed in compliance status at five different times in one year, four unions lapsed four times during the same year, and the remainder three times during that year.

It is part of the normal work of the Affidavit Compliance Branch to notify unions in advance of the expiration dates of their reports and affidavits so that they may be seasonably

renewed. But as we have shown, the policing of compliance is not concentrated upon any one particular period in point of time. It is an all-year-round subject of inquiry, in which the branch of the Board vested with the policing function deals with day-to-day fluctuations in the status of many thousands of unions which have filed the numerous prescribed documents with it.

Now, if compliance determinations were litigable at all—and clearly, if objections to compliance could be raised as a bar to proceedings in unfair labor practice cases they could also be raised as a bar to proceedings in representation cases—there would have to be not one hearing, but several, to determine whether at each stage where compliance was necessary the union was actually in compliance. It is impossible to conceive that the Congress which took affirmative steps to assure that certifications would not be "tied up for months" by the necessity of making compliance determinations, would sanction any procedure such as this which could hold up certifications not merely for months but for years. The only way to avoid a result so incompatible with Congress' manifest objectives is to hold that the procedure for determining compliance is entirely separate and distinct from the procedure for resolving questions concerning representation and unfair labor practice charges, and that compliance determinations are not litigable

in representation or unfair labor practice proceedings.

Moreover, the Board has adopted the administrative policy of refusing to issue orders requiring employers to bargain collectively with unions which are not currently in compliance (*supra*, pp. 6–7). If compliance determinations could be challenged in unfair labor practice proceedings, the Board could be required after issuing the decision to reopen the record to permit the employer to adduce proof that at the time the Board's order issued the union was not in compliance. Indeed it might even be contended that compliance would have to be determined as of the date of a court order enforcing the Board's order. To permit litigation of compliance at all these stages would, as Judge Goodrich said of an analogous procedure, make a "merry-go-round of the Act." *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 81 (C. A. 3).

D. *Congress did not intend, in Sections 9 (f), (g) and (h), to confer any benefits or rights on employers; hence an employer has no legal interest in questions of compliance which would entitle him to litigate such questions*

In what precedes we have sought to show that issues of compliance with Sections 9 (f), (g) and (h) were intended to be resolved administratively by the Board and the General Counsel

and were not intended to be the subject of litigation before the Board acting in its quasi-judicial capacity or in the courts. That conclusion as to the character of those issues is strongly reinforced by a consideration of the employer's lack of legal interest in issues relating to compliance by a charging union.

As we have pointed out (*supra*, pp. 34–38), the provisions of Sections 9 (f), (g) and (h) do not affect the employer's substantive obligations under the Act. They do not purport to immunize or to excuse conduct which would otherwise constitute an unfair labor practice. They do not preclude the Board from proceeding against such conduct upon a charge filed by someone other than a non-complying labor organization. They affect only the availability to the union of the opportunity to initiate proceedings by filing a petition or charge.

Thus the scheme of the Act demonstrates that Sections 9 (f), (g) and (h) were not designed to confer rights or benefits, either directly or indirectly, upon employers charged with unfair labor practices. Rather, the sole purpose of these provisions was to protect the interest of employees and of the public. The legislative history of the Act makes this clear. See H. Rep. No. 245, 80th Cong., 1st Sess., p. 33; 93 Cong. Rec. 3425, 3635, A–1911, 5110; Leg. Hist. 616, 800, 869, 1509.

Congress' intent to confer important benefits on employees is demonstrated in the statements of Representative Hartley, co-author of the Act, concerning the non-Communist provisions of Section 9 (h), and the requirement in Section 9 (f) which conditions access to the Board's facilities on a showing by the union that it has distributed copies of its financial statements to all its members. Representative Hartley stated that the provision for distribution of financial information conferred upon the union member the "right to know how much money his union has, how much it pays its officers, and how much of the union's money the officers use for their expenses." (93 Cong. Rec. 3425, Leg. Hist. 616). (See also the remarks of Representative Potts (93 Cong. Rec. 3635, Leg. Hist. 800); Representative Meade (93 Cong. Rec. A-1911, Leg. Hist. 869); Senator Kem (93 Cong. Rec. 5110, Leg. Hist. 1509); H. Rep. No. 245, 80th Cong., 1st Sess., p. 33)). He added that the non-Communist affidavit provision guaranteed to employees the "right of a union free of Communist domination and control" (93 Cong. Rec. 3425, Leg. Hist. 616). (See also remarks of Representative Case (93 Cong. Rec. 6283, Leg. Hist. 874); Senator McClellan (93 Cong. Rec. 4880, Leg. Hist. 1410); Senator McCarthy (93 Cong. Rec. 4882, Leg. Hist. 1414); H. Rep. No. 245, 80th Cong., 1st Sess., p. 38.)

Congress' intent to protect the public through the enactment of Section 9 (h) is expressed in

the remarks of Representative Mundt who, in discussing Section 9 (h), stated, "we are about to adopt some basic labor legislation to protect the public against excessive and unnecessary strikes" (93 Cong. Rec. 3629, Leg. Hist. 789). (See also the remarks of Representative Dondero, 93 Cong. Rec. 3633, Leg. Hist. 798.)

This intent is disclosed also in the preamble to the amended Act (61 Stat. 136, 29 U. S. C. Supp. III, 151):

> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities *which impair the interest of the public* in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein granted. [Emphasis supplied.]

The strikes which Congress tried to avoid were political strikes. On the basis of evidence which had been introduced before congressional committees[32] Congress had concluded that if and

[32] One specific example brought to committee notice was the 1941 strike in the Milwaukee plant of the Allis-Chalmers Manufacturing Co., when that company was producing vital defense materials. It was testified that the strike was caused

when Communists secure positions of leadership in labor organizations, positions in which they control or influence the bargaining process, they are likely to call such strikes and thereby interfere with the continuous flow of interstate commerce. Congress therefore acted to oust Communists from such positions.

Congress relied upon union members themselves to accomplish this objective. In Section 9 (h), it provided an incentive and information which would enable them to do so. Thus, the function of the affidavit required of union officers was to inform union members as to which of their leaders were Communists. As Mr. Justice Jackson said in his concurring opinion in *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 431:

> * * * hence the [Communists'] resentment of laws to compel disclosure of Communist Party ties. The membership is not likely to entrust its bargaining power, its records, and its treasury to such hands. When it does, the union finds itself a more or less helpless captive of the Communist Party. Its officers cease to be interested in correcting grievances but seek

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by Harold Cristoffel, "Communist Party member and president of the Allis-Chalmers local * * * pursuant to the decision * * * of the Communist Party". See Hearings before House Committee on Education and Labor on Bills to Amend and Repeal the National Labor Relations Act, 80th Cong., 1st Sess., pp. 3611–3615; *American Communications Ass'n* v. *Douds*, 339 U. S. 382, at p. 388.

> to worsen and exploit them; they care less for winning strikes than that they be long, bitter and disruptive.

The function served by denial of Board facilities to unions officered by non-signers of the affidavit was to provide an additional incentive for the ousting of Communist leaders by the union's membership. As this Court held in the *Douds* case, 339 U. S., at p. 393:

> * * * By exerting pressures on unions to deny office to Communists and others identified therein, § 9 (h) undoubtedly lessens the threat to interstate commerce * * *

The opinion of this Court in the *Douds* case, 339 U. S. 382, 396, 398, 399, 404, reflects the fact that in adopting Section 9 (h) Congress was concerned only with protecting the public interest and the interests of employees. Nowhere in the opinion is there any indication that this Court believed that Congress was concerned in this section with conferring rights or benefits upon employers. Indeed, the legislative history shows beyond doubt that enactment of these provisions did not stem from any concern for employer rights or interests. No supporter of the Act even suggested that these provisions would or should create special rights or benefits for employers.

It is true that one of the effects of the course which Congress took is that some employers oc-

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casionally may as a practical matter escape legal responsibility for unfair labor practices which they have committed. Thus, if the union members, contrary to the hope and expectation of Congress, should fail or refuse to oust Communist leaders, or if the union should fail to make the necessary financial disclosures to the Government and its members in accord with Section 9 (f), the Board will not issue a complaint against an employer on charges of unfair labor practices filed by that organization. But such an escape from legal responsibility is a wholly fortuitous consequence of the method chosen by Congress to achieve its objectives; it is a windfall, not a grant of legal rights to the employer by Congress.

Indeed, the employer's escape from legal responsibility for unfair labor practices, far from furthering the objectives of Congress, *pro tanto* impedes the effectuation of its over-all policies. For, to the extent that the employer frustrates his employees' collective bargaining rights, he creates the very conditions which the unfair labor practice provisions of the Act were designed to remedy, namely, conditions of industrial unrest which foster interruptions in the free flow of commerce.[33]

[33] This purpose is stated in the preamble and in Section 7 of the original Wagner Act which were retained substantially verbatim in the Labor Management Relations Act of 1947. The preamble, Section 1, reads in part:

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards

It follows that Congress did not choose to make employers its instrumentalities for effectuating the objectives of Section 9 (h). It did not seek to encourage unfair labor practices by employers as a means of putting pressure on union members to oust Communist leadership. It refused to modify the obligation of employers to refrain from such unfair labor practices as against non-complying labor organizations. It did not intend that a policeman so antagonistic to the broad objectives of the Act should share in the duty of enforcing it. Congress relied instead entirely upon the employees and the incentive which access to Board facilities to secure redress against illegal employer conduct provided. That incentive was placed in the care of the Board, not employers.

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commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

Section 7 reads:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Under these circumstances we submit that an employer is without standing to assert that the charging union was not in compliance with Sections 9 (f), (g) or (h), as a defense to an unfair labor practice proceeding under Section 10, either before the Board or in the courts. In order to claim the protection of those provisions the employer must show that those sections themselves confer upon him some judicially enforceable legal right. It is well settled that mere interest in the proper enforcement of the laws gives one no right to call the construction or enforcement of a federal statute into judicial question. *Ex parte Levitt,* 302 U. S. 633; *Massachusetts* v. *Mellon,* 262 U. S. 447, 486-488; *Alabama Power Company* v. *Ickes,* 302 U. S. 464, 478; *Tennessee Power Company* v. *T. V. A.,* 306 U. S. 118, 135; *Singer & Sons* v. *Union Pacific R. Co.,* 311 U. S. 295, 303-304. And this is true even where the application of the statute has resulted in injury to the person complaining of it. Cases cited *supra.* As stated in *Stark* v. *Wickard,* 321 U. S. 288, 306:

> To reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies.

In a number of cases litigants have sought to claim the benefit of statutory provisions designed for the protection of a class of which they were

not members. In each case they attempted to distinguish their interest from the interest of the general public in the proper administration of the laws, claiming, in view of their special interest, that the statute conferred upon them a justiciable right. But the courts have held mere special interest not enough; they have refrained from passing upon the interpretation or application of statutory provisions unless the party relying upon them shows that he is one of the class in whose interest or for whose protection the particular provision was enacted.

The classic example is *Perkins* v. *Lukens Steel Company*, 310 U. S. 113. In that case certain firms, potential bidders for public contracts, sought to secure judicial review of a minimum wage determination by the Secretary of Labor affecting such contracts. They claimed that the Secretary's determination was based upon misconstruction and misapplication of the relevant statutory provisions, and showed that they were specially injured by it because the determination impaired their ability to compete for public contracts on equal terms with their competitors. Plaintiffs asserted that their right to compete on equal terms was recognized and protected by the statute which required that public contracts be let through competitive bidding, and that their claim of infringement of that right was therefore justiciable. The Court held, however, that the

statute upon which the plaintiffs relied was enacted for the benefit of the Government, not of potential bidders, and that therefore, despite the special interest of the plaintiffs as potential bidders, and despite the injury which they might sustain as a result of the Secretary's wage determination, they had no right to challenge the Secretary's construction and application of the minimum wage provisions in the courts.[34] The Court said (310 U. S., at pp. 125–126):

> Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law. They claim a standing by asserting that they have particular rights under and even apart from statute to bid and negotiate for Government contracts free from compliance with the determination made by the Secretary of Labor for their industry. Respondents point to § 3709 of the Revised Statutes and to the Public Contracts Act itself.
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> Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders. "The United States needs the protection of publicity, form, regularity of returns and affidavit

[34] See the discussion of the *Perkins* case in *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, 139.

> (Revised Stats., §§ 3709, 3718–3724, 3745–3747), in order to prevent possible frauds upon it by others. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the Government and not upon him." That duty is owing to the Government and to no one else.

Like the duty imposed upon officers of the Government in Section 3709 of the Revised Statutes, to let contracts only after public bidding, the duty of issuing complaints on charges filed by labor organizations only if the organizations have complied with Sections 9 (f), (g) and (h) of the National Labor Relations Act was imposed upon the Board and the General Counsel, not upon employers. "That duty is owing to the Government and to no one else." As in that case, so here the Board's and the General Counsel's "responsibility is to superior executive and legislative authority. Respondents have no standing in court to enforce that responsibility or to represent the public's interest in the [Board's] compliance with the Act" (310 U. S. at 129).[35]

[35] Related principles resulted in dismissal of the plaintiff's suit in *Exner* v. *Sherman Power Construction Co.*, 54 F. 2d 510 (C. A. 2). There plaintiff's dwelling was injured by an explosion of dynamite, and he brought suit under a Vermont statute, Rev. Laws (1880) § 4323, Vt. Stat. (Rev. 1947) § 8590, which prohibited the storing of dynamite within fifty rods of an inhabited dwelling. Holding that because plaintiff's dwelling was situated more than fifty rods from

This principle applies equally to defendants who seek to invoke statutory provisions enacted for the benefit and protection of others as a bar to the maintenance of suit against them. Illustrative is *Grossman* v. *Young,* 72 F. Supp. 375 (S. D. N. Y.). In that case a minority stockholder brought suit under Section 16 (b) of the Securities and Exchange Act, 48 Stat. 881, 15 U. S. C. § 78p (b), which confers upon corporations the right to recover profits made in certain circumstances by their officers and large stockholders. Minority stockholders are authorized to bring action for the recovery of such profits in behalf of the corporation, but they must first demand in writing that the corporation itself sue, and wait sixty days thereafter before filing

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the place where the dynamite was stored, the plaintiff could not rely upon the statute, the court, speaking through Judge Learned Hand, said (54 F. 2d, at p. 512):

"* * * It is impossible to see how the plaintiffs were of the class intended to be benefited by a law forbidding storage of dynamite within an area in which they were not included. It is true that the act contained a provision for fines for continued violation, after notice from an inhabitant of the town to remove the dynamite. But that clause was intended only to afford ample means for informing the storer of the dynamite of his violation of law and to enable inhabitants of the town outside for forbidden area, even busybodies, to benefit those within it by setting penalties in motion. We see no reason to suppose that a general interest in having laws observed or in helping people within the zone extended the protection of the statute to all inhabitants of the town. The plaintiffs were not of the class to be benefited. Any reasoning which would embrace them would be applicable even if they had lived in a corner of the town five miles away."

their complaint. The statute contains a two-year period of limitations. In the *Grossman* case the minority stockholder served his written demand on the corporation less than 60 days before expiration of the two-year period, and filed his complaint without waiting the full sixty days. Relying upon this failure of the plaintiff to satisfy the statutory requirement, the defendant, an officer of the corporation, moved to dismiss. Judge Rifkind rejected the defense, holding that the sixty-day waiting provision was intended for the benefit of the corporation, to enable it to bring suit if it chose, not for the benefit of wrongdoing corporate officers, and that consequently the defendant officers could not claim benefit from the plaintiff's failure to comply. Accord: *Benisch* v. *Cameron*, 81 F. Supp. 883 (S. D. N. Y.).

Similarly, in *Gange Lumber Co.* v. *Rowley*, 326 U. S. 295, this Court held that an employer was without standing to raise constitutional objections to a provision of a state statute which enlarged the time within which an employee could apply to the State Department of Labor and Industries for allowance of additional workmen's compensation. The employer pointed out that at the time of enactment of the statute the original award to the employee had become "final" in the sense that any subsequent application by the employee for additional compensation was barred.

Thus the statute operated to revive a right on behalf of the employee which had expired and the exercise of which might adversely affect the employer by increasing the rate of insurance which he would be required to pay in the future. As one basis for rejecting this contention, the Court pointed out that the Department of Labor had always had power to grant additional compensation on its own motion and that the employer had, accordingly, always been liable to the entry of an additional award which might affect his insurance rates. Thus, the Court said (p. 307) that the employer—

> * * * has succeeded only in showing that one mode provided by the preexisting law for bringing the liability into play had been terminated. It was this and only this which the 1941 amendment revived. At the most, therefore, appellant's injury, if it were otherwise more substantial, would consist in the restoration of an alternative, if also possibly a more effective, method for putting in motion the machinery provided for making an award.

These principles are directly applicable here. In the *Grossman* case, as in the instant case, the consequence of holding the defense of alleged noncompliance with procedural provisions unavailable to the defendant was to subject him to the possibility of a judgment or order which might not otherwise have been issued against him.

But in this case, as in that one, that consequence is not sufficient to establish that the procedural provision upon which the defendant relied was enacted for his benefit or protection. Cf. *Gange Lumber Co.* v. *Rowley, supra.* And when it appears, as it does here, that the particular provision was not enacted for the benefit of the defendant, contentions of the defendant predicated upon it may not be entertained by the courts.

As we have seen, there is no basis for assuming that Congress' instructions to the General Counsel not to issue complaints where the charging union failed to comply, were intended to vest in employers a right to enforce this provision against the Board or the General Counsel. On the contrary, the legislative history shows that Congress selected the method of withholding Board facilities from non-complying unions for the sole reason that it considered the holding out of such benefits an effective inducement to compliance. Indeed, the disability of non-complying unions initially, under the House bill, attached only to certifications; it was extended to issuance of complaints on unfair labor practice charges only because Congress wanted to condition all benefits under the Act upon compliance (see pp. 45–47, *supra*). As Congress conceived it, therefore, the question involved in administering Sections 9 (f), (g) and (h), was whether labor organizations had satisfied conditions which gave

them standing to seek certain benefits from the government, not at all whether by proceeding on a charge filed by a labor organization the General Counsel was depriving the employer of any right. To hold that an employer had thereby acquired rights which he could litigate in an effort to evade liability for his wrongful acts would be to assume that Congress elevated the incidental impact of compliance determinations upon the employer to a plane far higher than the intended and direct impact of compliance determinations upon the labor organizations. The results of such a holding upon administration of the Act, as we have shown, would be disastrous. It should clearly be avoided if a contrary determination is possible, and we have shown that it is not only possible but indicated.

II

THE BOARD PROPERLY FOUND THAT THE FILING OF AFFIDAVITS BY THE OFFICERS OF THE CHARGING INTERNATIONAL UNION IN THIS CASE SATISFIED IN FULL THE REQUIREMENTS OF SECTION 9 (h), AND THAT ITS COMPLIANCE STATUS DID NOT TURN ON WHETHER OFFICERS OF THE C. I. O., WITH WHICH THE CHARGING UNION WAS AFFILIATED, ALSO FILED THE AFFIDAVITS

When, on August 22, 1947, Section 9 (h) became effective, "each officer" of a petitioning or charging "labor organization *and the officers of any national or international labor organization of which it is an affiliate or constituent unit*" were required to file a non-Communist affidavit before an investigation of the labor organization's

petition could be conducted or a complaint issued based upon its charge. Soon after the effective date of the Act numerous labor organizations took steps to come into compliance. The officers of local unions filed affidavits, and the officers of national or international unions with which these locals were affiliated also filed.

Almost at once disagreement developed between the former General Counsel and the Board on the question whether, in cases where the national or international labor organization was in turn affiliated with a federation, filing of affidavits by the officers of the local and the national or international was sufficient to bring the local into compliance with the statutory requirement. The former General Counsel's ruling that in such cases the locals would not be considered in compliance unless the officers of the federation also filed affidavits and the Board's reversal of that ruling in the *Northern Virginia Broadcasters* case, 75 N. L. R. B. 11, became a *cause célèbre,* not only in labor circles, but in the public press. Several factors combined to bring the issue to the attention of Congress.

The rulings of the former General Counsel and the Board on this matter were the first involving a major question of interpretation and construction of the 1947 amendments. Congressional interest in these amendments, and their construction and application by the former General Counsel and the Board, was then, of course, at

high pitch. Congress had manifested that interest by providing in the Act itself for the establishment of a so-called "watchdog" committee to investigate and report to Congress on the functioning of the Act (Section 401). This question was of more than ordinary concern to the Committee and to Congress, not only because of its novelty, but also because it involved the danger that a boycott of the Board, which had from the beginning been urged by some union leaders who opposed the Taft-Hartley Act generally, and Section 9 (h) in particular, could effectively be accomplished. As long as major unions which were willing to comply were able to do so, and thereby obtain the benefits of the Act, the danger of a successful boycott of the Board by recalcitrant unions was not great. The competitive disadvantage which recalcitrant unions would suffer could be relied upon to induce them to comply.

But the former General Counsel's ruling destroyed the pressure to comply. Officers of the largest national and international unions are, by virtue of their office, also officers of the major federations, the A. F. L. and C. I. O. Under the former General Counsel's ruling, the failure of one such international to comply made futile the compliance intentions of any other national or international union in the same federation and the threat of competitive disadvantage to recalcitrant unions vanished. Unions which de-

sired to comply were made, in effect, involuntary parties to the boycott. And since most major national and international labor organizations are affiliated with one of the national federations, virtually no cases could be processed by the Board. Had all the unions deliberately boycotted the Board the result could hardly have been more effective.

Consequently, when the Board's decision in the *Northern Virginia Broadcasters* case was announced, it was immediately hailed by Senator Taft, one of the authors of the Act, as one that would lead to general acceptance of the non-Communist provision,[36] and as "certainly not in conflict with the intention of Congress."[37]

When the Joint Committee on Labor Management Relations submitted its initial report to Congress on March 15, 1948, it treated in detail the Board's decision in the *Northern Virginia* case, S. Rep. No. 986, 80th Cong., 2nd Sess., Pt. 1, pp. 10–12. Virtually at the outset of its discussion of "The Non-Communist Affidavit" the Committee said:

> Despite the protests by many labor leaders and officials against the act and against the filing requirements accom-

[36] New York Herald Tribune, October 8, 1947, p. 18, column 5.

[37] New York Times, October 8, 1947, p. 6, column 3, quoted in *West Texas Utilities Co.* v. *National Labor Relations Board*, 184 F. 2d 233, 235–236, n. 8 (C. A. D. C.).

> panied by a threat of concerted refusal to file affidavits and registration statements, it is to be noted that no such boycott of the National Labor Relations Board and of the procedures of the act has ensued. * * * In many instances, unions have taken decisive action to compel reluctant officers to comply with the filing requirements.

After noting that "officers of a large majority of labor organizations have complied with the filing requirements," and setting forth the pertinent statistics contained in Board reports, the Committee expressed its "hopes that within the very near future all labor organizations in the United States will be persuaded of the benefits which the procedures under the Taft-Hartley Act hold out for them and will take the necessary steps to avail themselves of the benefits and peaceful procedures offered by the law."

The report then turned to consideration of the General Counsel's ruling that "these affidavits must be made by officers of the parent federations, the A. F. L. and the C. I. O., as well as by the officers of national or international unions and their locals, if the locals were to avail themselves of the protections of the act." The Committee commented that:

> The ruling aroused widespread comment and speculation because of the refusals of John L. Lewis, then an officer and vice

president of the A. F. L., and of officers of the C. I. O. to file the affidavits. On October 7, 1947, the Board, in its first ruling on the applicability of the affidavit and registration requirements, held that where the local union involved and the national or international labor organizations to which it is directly affiliated had complied, the local union was in full compliance whether or not the parent A. F. L. or C. I. O. had met the requirements.

After setting forth the facts of the *Northern Virginia* case, the Committee summarized the opinion of the majority of the Board as follows:

> The majority opinion noted that, under the regional director's ruling, if any single officer of the A. F. L. failed to comply, "not a single complying local or international union within that federation can derive any benefit from its own clean hands." The decision observed that to prohibit complying locals and complying national unions from invoking the jurisdiction of the Board for the reason that officers of the parent federation had failed to comply would detract from the fundamental purpose of this provision "to eliminate Communist influence from the labor movement of the United States." The majority also based its conclusion upon the meaning of the phrase "national or international labor organization" contained in section 9 (g) (h) of the act, stating that in ordinary labor parlance the term refers

> to labor organizations such as the International Brotherhood of Electrical Workers, rather than to parent federations such as the A. F. L. or the C. I. O.

The report did not even refer to the arguments advanced in the opinion of the dissenting Board member.

In its concluding observations, p. 33, referring generally to the Board's administration of the Act, as amended, the Committee said it "believes both the announced policies, and the actions taken, demonstrate that the act is being well administered." Under the title "Need for Amendments" (p. 34), the Committee, referring to "the situations to which various provisions of the new law have been applied," said, *"In each instance the law has adequately provided a remedy for the abuse which Congress sought to correct."* [Italics added.]

The Joint Committee again manifested its approval of the Board's construction in its second report to Congress. S. Rep. No. 986, 80th Cong., 2d Sess., Pt. 3, pp. 36–37. In that report the Committee again discussed the Board's decision in the *Northern Virginia* case, as well as other problems which had arisen in connection with the construction and administration of Section 9 (h). While the Committee made a number of criticisms and suggested various amendments to Section 9 (h), it voiced no criticism or objection to the Board's construction of the term

"national or international labor organization," and made no suggestion that the Act be amended to require officers of the federations to file affidavits, although at the time it made this report some officers of the C. I. O. had still not filed.

In approaching the question whether the Board's interpretation of Section 9 (h) effectuates the policies and objectives of Congress, it should be kept in mind, we think, that that interpretation has been subject to scrutiny by Congress itself. The Joint Committee had been charged by the Act itself with the duty of studying the Board's interpretation and administration of the Act (Secs. 402–403). In a statement to the Senate urging passage of the bill over the President's veto, Senator Ives of New York, one of the Managers on the Part of the Senate, who subsequently served on the Joint Committee, had pointed to the important role that the Joint Committee would play in assuring that the Act was administered in accordance with the intention of Congress (93 Cong. Rec. 7530–7531, Leg. Hist. 1641–1642. He had indicated (*ibid.*), that it would be the Joint Committee's responsibility to make sure that "there is no sabotage in the administration of the law"; "to prepare appropriate amendments and to see that these amendments are offered and properly supported at the next session of the Congress"; and "to help formulate administrative policy and procedure as

well as perform its functions as a strictly legislative agency at the inception of the new law." See also 93 Cong. Rec. 7527, 7533, Leg. Hist. 1636, 1646. Every member of the Joint Committee had been a member of either the House or the Senate Committee which reported the bills from which the Act ultimately emerged. Moreover, every member of the Conference Committee which was responsible for the final draft of the bill served on the Joint Committee.

Under these circumstances, the Joint Committee's approval, given within eight and eighteen months, respectively, after the effective date of the Act (cf. *Sioux Tribe* v. *United States,* 316 U. S. 317, 329–330), coupled with the absence of any attempt to amend the law so as to require officers of federations to file affidavits, seems to us, as it did to the Court of Appeals for the District of Columbia Circuit and the Sixth Circuit, clear evidence of "congressional acceptance" and adoption of the Board's view. *West Texas Utilities Co.* v. *National Labor Relations Board,* 184 F. 2d 233, 235, n. 8; *National Labor Relations Board* v. *Wiltsie,* Appendix III, *infra*; cf. *Herzog* v. *Parsons,* 181 F. 2d 781, 788 (C. A. D. C.), certiorari denied, 340 U. S. 810; *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 313–315; *Boehm* v. *Commissioner,* 326 U. S. 287, 291–292.

A. *The term "national or international labor organization" does not apply to a federation of autonomous national and international labor organizations*

The juxtaposition of the terms "labor organization" and "national or international labor organization of which it is an affiliate or constituent unit" in Sections 9 (f), (g) and (h) establishes that in the latter category Congress included those organizations which, *in relation to* the petitioning or charging labor organization, occupy the position of a "national or international labor organization." Congress clearly desired to reach union officers at two organizational levels, *i. e.,* officers of the labor organization which filed the charge or petition (usually a local union), and officers of any organization which stood in relation to it as a "national or international labor organization." Since Congress imposed the disability upon the petitioning or charging union, it is clear that the status of any organization with which it is affiliated as a "national or international labor organization" must be determined from the point of view of the petitioning or charging union. Thus, whether the officers of an organization with which the petitioning or charging union is affiliated must file affidavits and financial information in any particular case depends on whether that organization acts, in relation to the particular petitioning or charging union, as a "national or international labor organization."

1. *The definition of "labor organization" in Section 2 (5) of the Act supports the Board's view that, in relation to member national and international organizations, a federation is not itself a "national or international labor organization"*

It is true that Congress did not define in the Act the elements of the relationship between two organizations which are necessary to establish that one stands, *vis-a-vis* the other, in the role of "national or international." But that difficulty is largely overcome by reference to the statutory definition of "labor organization" in Section 2 (5) of the Act, a definition which was carried over verbatim from the Wagner Act. Section 2 (5) defines as a labor organization:

> * * * any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

This definition, though not originally designed for the purposes of Sections 9 (f), (g) and (h),[38] may be taken to reflect the view of Congress as to the elements indispensable to the treatment of an organization as a labor organization, and con-

[38] The definition was originally drawn broadly for the purpose of effectuating to the fullest extent the organizational freedom of employees which Congress protected in Sections 7, 8 (1), and 8 (2) of the Wagner Act. Congress was then concerned, for example, to eradicate company domination

sequently, as to the elements indispensable to the treatment of an organization, in its relations with another labor organization, as a "national or international labor organization." Local unions, like Local Union No. 1215, of the International Brotherhood of Electrical Workers, involved in the *Northern Virginia* case, are, of course, labor organizations within this definition. The vast bulk of petitions and charges filed with the Board are filed by such local unions, and their officers would therefore be required to file affidavits. Where local unions which file petitions and charges are affiliated with a national or international union, as was true in the *Northern Virginia* case, the officers of the national or international would also have to file, since such national or international unions exist "for the purpose in whole or in part, of dealing with employers" on behalf of their affiliated or constituent locals.

But where, in such a case, the national or international union is in turn affiliated with a national federation of unions, the officers of the federation would not be required to file, because, in its relationship to the local and to the international, the

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of employee representation plans, company unions, and all other employer-controlled bargaining devices, whether formally organized or not. See S. Rep. No. 573, 74th Cong., 1st Sess., p. 7; see also, *National Labor Relations Board* v. *James H. Matthews & Co.*, 156 F. 2d 706, 707–708 (C. A. 3); cf. *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817 (C. A. 3).

federation is clearly not a "labor organization" within the definition of Section 2 (5). This is true for two reasons. The first is that bargaining with employers is carried on by the national and international unions and their affiliated or constituent locals, not by federations on their behalf. Indeed, as we shall show, *infra*, pp. 119–123, the national and international unions which comprise the federations are autonomous bodies and the federations are powerless to intervene in negotiations between such unions and employers. Thus, in relation to its affiliated national and international unions, and their locals, the federations do not exist "in whole or in part," for the purpose of "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." The second is that employees who are members of locals and national or international unions are not even members of the federations and do not, as employees, "participate" in the affairs of the federations. The A. F. L. "is essentially a federation of unions and not of individual members. It is a union of unions."[39] And the C. I. O. Constitution, Article III, Section I, shows that it is composed of "affiliated national and international unions, organizing committees, local industrial unions and industrial union councils," not employees.

[39] Taylor, Albion, J., *Labor Problems and Labor Law* (Prentice Hall, Inc., 1938), p. 69.

This is not to say, of course, that in no circumstances may federations such as the A. F. L. or the C. I. O. be deemed labor organizations within the definition contained in Section 2 (5), or that these federations never occupy the position of "national or international labor organization" in relation to other labor organizations. Both the A. F. L. and the C. I. O. engage in organizational efforts among unorganized employees in fields to which the jurisdiction of national or international unions within the respective federations does not extend. In these fields the A. F. L. and the C. I. O. charter local unions which are affiliated directly with the federation.[39a] The federations engage in collective bargaining with employers on behalf of these directly affiliated locals, and sometimes in their own name file petitions or charges with the Board on their behalf.[40] Constitution of the American Federation of Labor, Article XIII, Secs. 2, 3;

[39a] "These local trade and federal labor unions must be sharply distinguished from the local unions of the national unions affiliated with the federation; the federation has practically nothing to do, directly, with the latter local unions." McCabe, David A. and Lester, Richard A., *Labor and Social Organization* (Little, Brown and Co., 1938), pp. 47–48; see also, Faulkner, Harold U., and Starr, Mark, *Labor in America* (Harper & Bros., 1944), p. 111.

[40] See *e. g.*, *Hanson Clutch & Machinery Company*, 70 N. L. R. B. 1021 (A. F. L.); *The Houston Press Company*, 70 N. L. R. B. 660 (C. I. O.); *Albemarle Paper Mfg. Co.*, 70 N. L. R. B. 153 (C. I. O.); *Volney Felt Mills, Inc.*, 70 N. L. R. B. 908.

Constitution of the Congress of Industrial Organizations, Article III, Sections 3, 4; Article VI, Section 1; Article VII, Section 5. This is "a transitional arrangement," pending the establishment of internationals.[40a] Article III, Section 3, of the Constitution of the C. I. O., for example, provides that "it shall be the duty of the Executive Board to combine local industrial unions into national or international unions or organizing committees."[40b] Nevertheless, while such a relationship exists, and in respect to it, the federations are clearly acting as "labor organizations" within the meaning of Section 2 (5), and the Board has so held. (See p. 16, note 27, *supra*.) In its Thirteenth Annual Report to Congress (Gov't Print. Off., 1949, p. 24), the Board stated:

> * * * the A. F. L. or the C. I. O. may be subject to the filing requirements of

[40a] McCabe & Lester, op. cit. *supra*, note 39a, at p. 95.

[40b] Compare, Article IX, Section 3, Constitution of the American Federation of Labor: "The Executive Council shall use every possible means to organize new National or International Trade or Labor Unions, and to organize Local Trade and Federal Labor Unions and connect them with the Federation until such time as there is a sufficient number to form a National or International Union, when it shall be the duty of the President of the Federation to see that such organization is formed." Section 4 provides further: "When a National or International Union has been formed, the President shall notify all Local Unions of that Trade to affiliate with such National or International Union, and unless said notification be complied with, within three months, their charters shall be revoked."

> the act when, in a particular situation it exists for the purpose of dealing with an employer in collective bargaining and it seeks recognition for such purpose, or when it organizes and grants charters to directly affiliated local and Federal labor unions, and there is no intervening national or international union with which the local is affiliated.*

It is clear, therefore, that judged by the definition in Section 2 (5), federations like the A. F. L. and the C. I. O. constitute labor organizations in relation to the locals directly affiliated with them but do not constitute labor organizations in relation to autonomous international unions and their locals. Thus, applying the statutory definition, when the A. F. L. or C. I. O. themselves file charges or petitions with the Board they may be found to be labor organizations for the purposes of Sections 9 (f), (g) and (h). And, when petitions or charges are filed by locals affiliated directly with a federation, the federation may be held to constitute a "national * * * labor organization." But, when a petition or charge is filed by a local union affiliated directly with an international union, or by an international union

* *Matter of S. W. Evans & Son* (75 N. L. R. B. 811); see also Board Member Murdock's special concurrence in *Matter of Northern Virginia Broadcasters, Inc., Radio Station WARL, supra, and Matter of Schenley Distilleries, Old Quaker Division* (77 N. L. R. B. 468), as to the relationship between a Federal labor union and the A. F. L.

itself, the federation with which the international is in turn affiliated may not be held to constitute a "labor organization" within the meaning of Section 2 (5), and consequently may not be held a "national or international labor organization" whose officers are required to file affidavits as a condition precedent to the grant of the Board's facilities to the local or international union.

In its opinion in *National Labor Relations Board* v. *Postex Cotton Mills, Inc.*, 181 F. 2d 919, 921, the Court of Appeals for the Fifth Circuit held that "The statutory terms may not be properly defined upon the basis of the capacity in which the labor organization acts in a particular instance." With due deference, we submit the contrary is true. For example, under the original Act, a foreman was an "employee" or an "employer" depending "upon the basis of the capacity in which [he] acts in a particular instance." See *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 488–490. Similarly, the Court of Appeals for the District of Columbia Circuit has been held to be a legislative or a judicial body, depending "upon the basis of the capacity in which [the Court] acts in a particular instance." See *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 442–444.

To hold that applicability of the term "national or international labor organization" cannot be made to turn in each instance upon the basis of

the capacity in which the organization involved acts, would lead to the conclusion that the federations never fall within the term, for the vast proportion of the activities of the federations are concerned with the international unions which are their members, not with the relatively unimportant directly affiliated locals. On an all-or-none basis, unless the tail were permitted to wag the dog, federations would thus be excluded entirely. Indeed, the relationship of a federation with its national and international affiliates bulks so large in the whole that its relationship with locals and organizing committees which it charters directly is sometimes overlooked. The characteristic feature of a federation, which distinguishes it from a national or international union, is precisely its relationships with such national or international unions. It is for this reason, as we shall now show, that the term "national or international labor organization" has come to have a clear and well-defined meaning in the labor relations field, a meaning which clearly excludes federations from its scope.

2. *The term "national or international labor organization" has a well-defined meaning in labor relations parlance. Congress must be presumed to have intended that meaning to attach to its use of the term*

Unlike the broad term "labor organization," the limited term "national or international labor organization" is not defined in the statute. But,

as Congress must have known, these words are a term of art in the labor relations field. "Congress will be presumed to have used a word in its usual and well-settled sense." *United States* v. *Stewart,* 311 U. S. 60, 63; see also *Deputy* v. *du Pont,* 308 U. S. 488, 498; *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560. As the Board pointed out in the *Northern Virginia* case, 75 N. L. R. B., at p. 14:

> In the absence of clear expression of legislative intent to the contrary, Congress, when legislating on a specialized subject, is deemed to have used words in the sense in which they are commonly understood by those who deal daily with that subject.

Literature in the field of labor economics is so replete with references to and recognition of the distinction between a "national or international labor organization" on the one hand, and a federation of national and international labor organizations on the other, as to place beyond question the Board's conclusion that to anyone familiar with the field, the term "national or international labor organization" has a definite connotation, and excludes federations. In 1947, for example, the Industrial Relations Branch of the Bureau of Labor Statistics, United States Department of Labor, published a study prepared by John M. Brumm, entitled "Brief History of the American Labor Movement." To his first reference to "national and international unions"

(p. 4), the author appended the following footnote:

> Unions called themselves "internationals" when some of the affiliated locals were outside the United States, usually in Canada. Today the terms "national unions" and "international unions" are used interchangeably to designate the larger *organizations* to which local unions in a craft or industry are affiliated. [Italics added.]

P. H. Casselman, in *Labor Dictionary* (Philosophical Library, New York, 1949), p. 211, defining "international union," says:

> In America the term refers to *labor organizations*, made up of local unions operating in the United States and Canada and sometimes Mexico. [Italics added.]

Another official publication, *Handbook of American Trade Unions*, U. S. Department of Labor, Bureau of Labor Statistics, Bull. No. 618 (1936 ed.), p. 49, declares that:

> Structurally the American Federation of Labor continues to be what it was at its inception—a federation of autonomous *national and international organizations* of workers in various crafts, trades and industries. [Italics added.]

The following quotations are also illustrative: Clyde E. Dankert, *Contemporary Unionism* (Prentice-Hall, Inc., 1948), pp. 56, 104:

> The American Federation of Labor is a *federation*. It is a group of unions banded

together for the purpose of achieving certain purposes, but it is a group in which the chief members retain virtually complete control over their own affairs.

* * * * *

As in the A. F. of L. the most important units in the C. I. O. are the nationals and internationals.

John A. Fitch, *The Causes of Industrial Unrest* (Harper & Brothers, 1924), p. 99:

> The [A. F. L.], as the name implies, is a federation of the national and international unions. It has no power over the affiliated bodies except the power of expulsion. * * * So far as the Federation is concerned, each affiliated union is supreme in its own field. The doctrine of trade autonomy is a basic one with the American Federation of Labor.

Albion G. Taylor, *Labor Problems and Labor Law* (Prentice-Hall, Inc., 1938), pp. 69–70:

> The *national* or *international* union is a federation composed of locals in a given craft or industry in the United States, sometimes including those in Canada and Mexico. The constituent "nationals" of the American Federation of Labor are powerful, sovereign bodies, creating locals by charter at will, and revoking them likewise, reserving the power to suspend or otherwise discipline locals, calling strikes, and bargaining. They are the independent

groups of which the American Federation of Labor is but a confederation or alliance.

Lloyd G. Reynolds, *Labor Economics and Labor Relations* (Prentice-Hall, Inc., 1949), p. 143:

> The national unions are not members of the A. F. L. or C. I. O. in the sense that Minnesota is a part of the United States. Their position is similar to that part of individual countries within the United Nations. The A. F. L. or C. I. O. executive council corresponds roughly to the U. N. Security Council. Each major union has a veto power and can prevent any action adverse to its interests. It is a serious problem for the labor federations, as it is for the U. N., to find useful activities which will not break up the organization by causing internal strife among the members.

Florence Peterson, *American Labor Unions* (Harper and Brothers, 1945), p. 57:

> The International unions are the autonomous, self-governing units of the labor movement.

David A. McCabe & Richard A. Lester, *Labor and Social Organization* (Little, Brown and Co., 1938), p. 46:

> The Federation is not a primary labor organization; it is the creature of the national trade unions, established to secure that degree of community of action that can safely be combined with autonomy for each national union in trade policies, collective bargaining and strikes.

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Philip Taft, *Economics and Problems of Labor* (Stackpole Sons, 1942), pp. 494–495:

> The most important unit in the American Labor Movement—both A. F. of L. and C. I. O.—is the national or international union. An international Union is so designated because it frequently has locals in Canada and in Mexico. It is the unit of structure and of government; and it is the body that controls the jurisdiction * * *. It should be remembered that the international is made up of locals which are its constituent and subordinate elements. The structure of the international union is usually determined by a number of conditions, such as time of organization, leadership, changing processes, and needs for adjustment to technological change. International unions regardless of their affiliation or nonaffiliation with other central bodies, are the dominant groups in the American Labor movement.

Jack Barbash, *Labor Unions in Action* (Harper and Bros., 1948), pp. 28–29:

> The meaningful story of the American Labor movement is essentially the story of the international unions. The international union on the whole is a self-contained unit. Without the international unions, the federations have no meaning and not much substance. The reverse is not true. The international unions can

and have functioned without affiliation to the federations.

Scott, Clothier, Spriegel, *Personnel Management*, 4th Edition (McGraw-Hill Book Co., 1949), pp. 543–544:

> The A. F. L. is a relatively loose federation of national unions. * * *
>
> The loose federation gives the A. F. L. relatively little control over its member international unions. This is particularly true when the international is large enough and strong enough to go its way alone.

Carroll Daugherty, *Labor Problems in American Industry*, 5th Edition (Houghton, Mifflin Co., 1941), p. 371:

> At the end of 1940, the structure of the C. I. O. was not dissimilar to that of the A. F. L. The backbone of the organization, as with the A. F. L., was made up of the loosely federated national unions.

It is also recognized that federations such as the A. F. L. and C. I. O. can be analogized to "national and international labor organizations" only insofar as their relations with directly affiliated locals and organizing committees is involved. For example, Millis and Montgomery, in *Organized Labor* (McGraw-Hill, 1945), p. 308, note 2, state: "The A. F. of L. serves as an international for the [directly] affiliated local and federal labor unions." McCabe & Lester, *op. cit., supra*, pp. 95, 103, point out

at p. 48, that "The Federation stands somewhat in the relation of a national union, for the time being, to the local trade and federal labor unions."

Based upon its own knowledge and experience, and its familiarity with the sources quoted above, the Board observed in the *Northern Virginia* case (75 N. L. R. B., at pp. 13–14):

> * * * In ordinary labor relations parlance these words have a definite, and almost technical, meaning. They refer to labor organizations such as the I. B. E. W. in this case, an "international" union. Most of the "national" and "international" unions which are the dominant groups in the American labor movement, are affiliated with either the A. F. L. or the C. I. O. * * *
>
> We are familiar with no use of the term "national or international labor organization" which includes parent federations such as the A. F. L. or the C. I. O. within its meaning. On the contrary, every definition or description of the structure of these two federations clearly indicates that the A. F. L. and the C. I. O. are different from "national" or "international" labor organizations. Thus, the United States Department of Labor declares that "structurally the American Federation of Labor continues to be what it was at its inception—a federation of autonomous national and international organizations of workers in various crafts, trades and industries." And a noted student of the history and

> structure of American trade unionism describes the A. F. L. as "a federation of independent autonomous, international unions, each having its own traditions and its own internal government. Each international union exercises the right to determine in accordance with its own needs, its dues, policies and program." [Footnotes omitted.]

Thus, when Congress used the term "national or international labor organization" in Sections 9 (f), (g) and (h), it must be presumed to have known that to those who were to administer the statute the words would be taken as referring normally to national and international unions and not to federations, except insofar as a federation, in any particular case, served "as an international" for labor organizations affiliated directly with it.[41] This is particularly so since, as the Board observed (75 N. L. R. B., at p. 14), and

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[41] In its opinion in the *Postex* case, 181 F. 2d 919, 920, the Court of Appeals for the Fifth Circuit suggested that the force of this argument "is considerably weakened by the observation that these writers refer to the relationship of national and international *unions* to the American Federation of Labor or the Congress of Industrial Organizations, not to national or international *organizations*, as does the statute." We are compelled to differ with this "observation." The very quotations set out in the text (see particularly the italicized quotations at p. 101) show that the writers used the terms "unions" and "organizations," or "labor organizations," interchangeably in this connection, as does the public generally, and as this Court did in *American Communications Association* v. *Douds*, 339 U. S. 382. "It seems more reasonable to us that 'organization' was used [in the

as we shall now demonstrate, "the legislative history of the new statute does not show Congressional intent to give a different meaning to these words."

3. *The legislative history tends to show that Congress used the term "national or international labor organization" in its usual labor relations sense*

Neither in the Committee Reports on the bill, nor in the course of debate, did the sponsors or opponents of the bill deal explicitly with the question whether officers of the major federations should be required to file affidavits as a condition precedent to the use of Board facilities by affiliated nationals or internationals and their locals. At one point Senator Taft indicated that he was under the impression that under the predecessor House bill the Board would have been required to "investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation" (93 Cong. Rec. 6445, Leg. Hist., p. 1542). But, as the Court of Appeals for the District of Columbia Circuit pointed out in the *West Texas case,* 184 F. 2d, at 237–238:

> * * * the House bill which was the forerunner of 9 (h) forbade certification

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Act] instead of 'union' merely because not all bodies popularly known as unions are such by name. They are variously labelled union, brotherhood, association, guild, alliance, board, plan, etc." *West Texas Utilities Co.* v. *National Labor Relations Board*, 184 F. 2d 233, 238 (C. A. D. C.)

of any labor organization as a collective bargaining representative "if one or more of *its national or international officers*" were Communists.[18] The words italicized by us would seem to indicate that the bill was aimed at the local union and at "its national or international officers"—not at the federation of which a national or international union is a virtually autonomous part.[19] This language remained in the bill as it first passed both House and Senate[20] and was changed to its present form only when the non-Communist requirement was recast so as to provide for affidavits. It does not appear that any change in meaning was intended by the substitution of "such national or international labor or-

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[18] Section 9 (f) (6) of H. R. 3020, 80th Cong., 1st Sess., read, in pertinent part, "No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot taken under subsection (d), is a member of the Communist Party * * *." 1 Legislative History of the Labor Management Relations Act, 1947, p. 63 (1948).

[19] House Report No. 245 on H. R. 3020 refers to the fact that "At least *11 great national unions* and a large number of local unions seem to have fallen into the hands of Communists, although in every case Communists appear to compose only a very small minority of the membership. In most of these cases the rank and file object to communistic influence in their unions." Id. at 329. [Emphasis supplied.] There are only *two* federations of importance, the A. F. L. and C. I. O.

[20] Id. at 190, 250.

> ganization" for "its national or international officers."

The House Report itself, H. Rep. No. 245, 80th Cong., 1st Sess., p. 38, as the court noted in footnote 19, above, confirms the view that Congress conceived of the evil against which it was legislating as existing in national and international unions, and that the language it used was designed to reach them, and not federations. The same report, p. 10, also referred to the Act as providing:

> that the new Board shall not certify as *bargaining agents* for workers *Unions* whose officers are Communists. [Italics added.],

language which would not apply to the A. F. L. or C. I. O. in their relations with affiliated national and international unions.

That the Senate was well aware of the significance of the term "international union," appears from the following colloquy between Senators Morse and Aiken, both members of the Senate Committee (93 Cong. Rec. 4668, Leg. Hist., p. 1288):

> Mr. MORSE. I am very glad the Senator raised the point, because the phrase "international union" has had a great many ominous meanings read into it. When we speak of international unions, Mr. President, we think of such international unions as the International Woodworkers of

> America and the United Steelworkers of America. For that matter, some of the railroad brotherhoods are international unions, too, if they cover the Canadian railroad system as well as the American railway system. But the international unions referred to are limited almost entirely to American and Canadian unions. They have a constitution with which the local unions associate themselves, and they agree to abide by its terms.
>
> Mr. AIKEN. That has always been my understanding. I thought this a good time for the Senator from Oregon to state it in the Record.

It is, of course, true that the term "labor organization" *without the limiting adjectives "national or international"* was conceived by various Congressmen to apply, in other contexts, to the A. F. L. and C. I. O. Thus, in connection with Section 304, which makes it unlawful for any "labor organization" to make contributions or expenditures in connection with federal elections, various examples were given which indicated that the speakers believed that the A. F. L. and the C. I. O. would be affected by the provision (See *e. g.*, 93 Cong. Rec. 6439, 6440, 6447–6448, Leg. Hist. 1532, 1533–1534, 1548). But when Congress desired in the statute to refer to the A. F. L. or the C. I. O., either along with other labor organizations, or to them alone, it never used the term "national or international labor or-

ganization." Depending on the context, it used such words as "an organization," "labor organization," or "labor organization national or international in scope" instead. Thus, in Section 9 (b) (3), where it appears that Congress intended to preclude certification as representative of a plant guard unit of any labor organization affiliated with the A. F. L. or C. I. O. (H. Rep. No. 510, pp. 47–48, S. Rep. No. 105, pp. 3–5), Congress provided as follows:

> * * * no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is *affiliated directly or indirectly with an organization* which admits to membership, employees other than guards. [Italics added.]

The latter example is particularly illuminating since Congress was dealing in Section 9 (b) (3), as it was in Sections 9 (f), (g) and (h), with a relationship between a particular labor organization and some larger body. In 9 (b) (3), where the relationship to a federation was presumably intended to be included, the larger body was described as *"an organization"* with which the particular labor organization is "affiliated directly or indirectly." By way of contrast, in 9 (f), (g) and (h) the statute refers to a "national or international labor organization" of which the particular labor organization is an affiliate or constituent unit.

Finally, the President of the United States, in his veto message, indicated that he understood that the term "national or international labor organization" as used in Section 9 (h) did not apply to the federations.[41a] Again we quote from the opinion of the Court of Appeals in the *West Texas* case, 184 F. 2d at p. 238:

> * * * in his veto message, the President said, "The mere refusal by a single individual to sign the required affidavit would prevent an *entire national labor union* from being certified * * *. *The union and the affected industry* would be disrupted for perhaps a long period of time * * *." It seems to us that, had it been thought that 9 (h) required federation officers to file, the President would undoubtedly have pointed out the calamitous effect on the entire economy of noncompliance by a single federation officer. Not one but many industries and many "national labor unions" would then be affected by his failure to file. [Footnotes omitted.]

The Act contains additional evidence to support the Board's conclusion (*Northern Virginia Broadcasters,* 75 N. L. R. B., at p. 14), that,

[41a] That this was the President's view is particularly significant, for in urging that the bill be passed despite the President's veto, proponents of the measure repeatedly asserted that in the veto message "[t]he worst possible interpretation again and again is placed upon the bill's provisions," 93 Cong. Rec. 7530, Leg. Hist. 1641; see also, 93 Cong. Rec. A3043, 7529, Leg. Hist. 1626, 1638–1639.

> * * * Congress could not have deliberately intended "national or international labor organization," as used in Sections 9 (f), (g) and (h), to include the two great national federations within its meaning.

Thus, "national and international labor organizations" whose officers must file affidavits under Section 9 (h), must also file the information and reports required in Sections 9 (f) and (g). The nature of the requirements contained in those subsections clearly indicates that in using the terms "labor organization" and "national and international labor organization" Congress was thinking of national and international unions and their locals, not the federations. As the Board noted in its decision in *Northern Virginia Broadcasters* (75 N. L. R. B., at 14), "most of this information [required by Section 9 (f)] can have no application to the two major federations." The provisions having to do with dues and initiation fees and a statement of the labor organization's internal structure such as appointment of stewards, benefit plans, strike authorization, and bargaining policies and procedures, are in no manner applicable to the federations. As the Board stated (75 N. L. R. B., at 14, note 10):

> [The federations] charge no initiation fees or dues, do not concern themselves with qualifications for membership in their affiliated international, play no direct part in bargaining, do not authorize strikes.

> On the other hand, local and international unions are directly concerned with all these matters. Clearly this provision cannot have been drafted with the national federations in mind.

We think this legislative history furnishes affirmative support for the presumption that Congress used the term "national or international labor organization" in its accepted customary sense. But, if the few indications to the contrary should be given more weight than we believe them entitled to, the most that could be said would be that "the legislative history is more conflicting than the text is ambiguous." *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 49. Ambiguous legislative history will not suffice to rebut the presumption that Congress intended to use the words "national or international labor organization" as they are normally used in labor relations terminology. That presumption is reinforced by the unavailability of any other reasonable interpretation of the modifiers "national or international." An "international" in labor relations parlance is, as we have shown, an American trade union containing locals in Canada. A "national" union is one which does not have such locals. Thus, the words "national or international" together refer to the various trade unions making up the federations—which are themselves neither "national" or "international" labor organizations.

If this usage is rejected the only other meaning that can be given the words "national" and "international" would be their ordinary, non-technical meanings.[42] Such a construction, however, leads immediately to nonsense. Neither the C. I. O. nor the A. F. L. are "international" organizations in the dictionary sense.[43] There are, however, a number of international organizations (in the dictionary sense) with which American trade unions are affiliated—the International Labor Organization, the World Federation of Trade Unions, the International Confederation of Free Trade Unions, etc.[43a] If the terms "na-

[42] This is true, of course, except where it clearly appears that Congress intended to attach another, and different meaning to the words. When Congress intended to do that, as it did in the second proviso to Section 10 (c), it made its meaning perfectly plain by adding to the words "national or international", the qualifying words "in scope." See, S. Rep. No. 105, 80th Cong., 1st Sess., pp. 12–13; H. Rep. No. 510, 80th Cong., 1st Sess., pp. 40, 48, 54. Compare the use of the phrase "national or international in scope" in the proposed Senate amendment dealing with industry-wide bargaining (S. Rep. No. 105, p. 51). The absence of these qualifying words in Sections 9 (f), (g) and (h) thus gives added force to the view that in those Sections Congress was not using the words "national or international" in a sense different from their normal usage in labor relations parlance.

[43] Canadian locals of international unions affiliated with the C. I. O. and the A. F. L. are affiliated directly with the Canadian counterparts of the federations—the Canadian Congress of Labor and the Canadian Trades and Labor Congress.

[43a] Price, John, *The International Labour Movement* (Oxford University Press, 1945), pp. 51–55, 173–178; *Free Trade Unions of the World Unite in New Confederation*, 50 The

tional" or "international" are given their non-customary meaning then "national" can, it is true, be taken to include the C. I. O. and the A. F. L. But, equally, "international" would then include the genuinely international labor organizations with which American trade unions are affiliated. The statute thus read would require that all of the officers of such genuinely international labor organizations file non-Communist affidavits (and also that such organizations file financial reports with the United States Department of Labor) before any American labor organization affiliated with it could utilize the processes of the Board. It cannot be assumed that Congress intended such an absurd result. Yet that result necessarily follows if the words "national or international" are not confined to their customary trade union meanings.

B. *The Board's construction of the term "national or international labor organization" in relation to federations effectuates the policy of the Act and comports with the objectives of Congress*

1. *The objective of Congress in Section 9 (h) was to prevent political strikes and preserve the integrity of the collective bargaining process by driving Communists*

Labour Gazette (Department of Labor, Ottawa, Canada, Feb., 1950), pp. 172–182; Sturmthal, Adolf, *The International Confederation of Free Trade Unions*, 3 Industrial and Labor Relations Review, p. 375; Becu, Omer, *Role of the Trade Secretariats*, The American Federationist (March 1951), p. 25.

from positions in which they can exercise power to engineer political strikes and subvert the bargaining process

Speaking of this Court's decision in *American Communications Association* v. *Douds*, 339 U. S. 382, the Court of Appeals in the *West Texas* case said (184 F. 2d 233, at p. 236):

> * * * It was held therein that the constitutional justification for a non-Communist affidavit lay in its function as a deterrent to political strikes which might seriously burden interstate commerce. The emphasis throughout the opinion was that 9 (h) was aimed at those who control the collective bargaining process and hence are in a position to call political strikes. Thus, Mr. Chief Justice Vinson, speaking for the Court, pointed out that Communists might carry their revolutionary objectives "into their conduct of union affairs by calling political strikes"; that their beliefs "strongly indicate a will to engage in political strikes and other forms of direct action when, as officers, they direct union activities." It was expected, said Mr. Justice Jackson, concurring in part and dissenting in part, that when the Communist affiliation of union officers was called to the attention of the union membership, it would no longer "entrust its bargaining power, its records, and its treasury to such [Communist] hands. When it does * * * [i]ts officers cease to be interested in correcting grievances but seek to worsen and exploit them;

they care less for winning strikes than that they be long, bitter and disruptive." To prevent such a distortion of the Act's overriding purpose—which is the promotion of peaceful collective bargaining—Congress could "protect a labor union from Communist Party domination * * * [just as] from employer domination."

Analysis shows that it is the locals and their parent nationals and internationals who participate in the collective bargaining process and are empowered to call strikes. Federations neither participate in collective bargaining on their behalf, nor are they empowered to call strikes among the autonomous organizations which are affiliated with them. For example, examination of the constitutions of the federation here involved, the C. I. O., and the charging international union involved here, the Textile Workers Union of America, reveals that the process of collective bargaining falls completely within the jurisdiction of the latter. Thus, Article II, Section 2 of the Constitution of the Textile Workers Union of America provides that the International shall accomplish its purpose "by * * * negotiating collective bargaining agreements with employers * * *." Article IX, Sec. 5 and Article XVI require specific approval by the international's officers of all contracts made by subordinate local boards and unions. The International's control over the collective bargaining

of its locals is thus made exclusive. Moreover, under Article VIII, Secs. 3, 5 and Article IX, Sec. 3, the International's control extends as well to any by-laws or rules of the local, or any jurisdictional controversy to which the local may be a party. Article VIII, Section 5 empowers the International's Executive Council to amend or revoke a local's charter, and Article VII, Section 4 empowers the council to "take possession of and administer the affairs, funds and property of any local union," when it is deemed "necessary to protect the interests of the International Union." Article XVII provides that strikes may be called by a local only when authorized in writing by the General President of the International.

At no place in the entire body of the Textile Workers' Constitution, except on the title page, is it shown that the International is affiliated with the Congress of Industrial Organizations. In the field of collective bargaining the Textile Workers' authority is absolute. It is a completely autonomous organization.

In contrast, the Constitution of the C. I. O. does not speak of the C. I. O. as engaging in collective bargaining, authorizing strikes, or otherwise controlling the affairs of its affiliated national and international unions or their member locals. On the contrary it provides in Article II that the C. I. O. will accomplish its objectives "(2) by extending the benefits of collective bargaining, *by forming labor unions capa-*

ble of dealing with employers." [Emphasis supplied.] Nowhere in the document is there any grant of power to the C. I. O. which would enable it to control, influence or interfere with the bargaining practice of its affiliated internationals or nationals or their locals. It has no role in their collective bargaining policies or procedures.

Qualified experts confirm this analysis. "The constituent national unions have reserved to themselves the determination of their policies with respect to such matters as admission to membership, labor saving devices, methods of payment, rates of wages, hours of labor, collective bargaining, and strikes. The officers of the Federation may exercise some moral influence upon them in these matters, but the Federation leaves the final decisions to the respective affiliated national unions; it does not lay down their policies for them, nor does it carry on collective bargaining for them, nor order them out on strike, nor order them back to work after they have struck." McCabe & Lester, *Labor and Social Organization* (Little, Brown and Co., 1938), pp. 48–49.

As the Court of Appeals said in the *West Texas* case (184 F. 2d 233, at 237):

> * * * The position of the federation is not markedly different from that of a trade association made up of individual employers. Like the latter, it seeks to coordinate policy, provide encouragement, and per-

form certain staff functions such as research and publicity. Like the latter, it can hardly be described as a participant in or as in control of the collective bargaining process.

It follows that the officers who must be required to file the affidavits, if the objectives of Congress are to be achieved, are the officers of locals and of national and international labor organizations, for it is they who participate in the collective bargaining process and are empowered to call and to perpetuate strikes. But, insofar as charges and petitions filed by such organizations are concerned, the objectives of the statute do not require that the officers of the federation with which they are affiliated must file, since federation officers take no part in bargaining where organizations of this character are involved, and are not empowered to call strikes of their members. On the other hand, where locals or organizing committees affiliated directly with a federation file the charge or petition, the objective of the statute does require that officers of the federation file affidavits, for the federation officers do participate in bargaining with employers on behalf of such locals and organizing committees and are empowered to call strikes of their members. This, of course, is precisely what the Board's construction of Section 9 (h) envisions (*supra*, pp. 92–98), and the Board's construction therefore

demonstrably accords with the purpose and objective of Congress.

2. *The means selected by Congress for accomplishing its purpose are effectuated by the Board's view*

The Board's construction accords with the scheme of the statute for still another reason. The legislative history shows, as this Court recognized in the *Douds* case, see particularly the opinion of Mr. Justice Jackson, 339 U. S., at p. 431, and the dissenting opinion of Mr. Justice Black, at p. 450, that Congress relied on union members to oust from office those officers who either could not or would not file affidavits. As the Board said (*Northern Virginia Broadcasters*, 75 N. L. R. B., at pp. 14–15), Section 9 (h) was designed—

> to compel those union leaders who were actually Communists or adhered to Communist doctrines to run the risk of a prosecution for perjury, or else forfeit the privilege of using the Board's machinery to advance the interests of the local, national or international unions of which they were officers. * * * The assumption is that if the facts are made known through this filing procedure, union members, provided they can reasonably be expected to have the power to do so, will soon remove Communists from leadership rather than allow themselves to be precluded from enjoying the benefits of the Act.

Members of local unions can accomplish this objective with respect to officers of their locals and their national or international officers, but not with respect to officers of federations, for they are not even members of the federation, and have no power to vote, either directly or through local delegates, for or against particular federation officers. We think the Board was entirely correct when it said in the *Northern Virginia* case, *ibid.* at p. 15,

> Are Communists likely to be eliminated from positions of influence in the labor movement by our barring those local and international unions that are in full compliance with Section 9 (h) from using the facilities of the Board, merely because certain officers of a parent organization over whose status they have only the most remote control may choose not to sign the required affidavits? We think not. * * * Control is too slight; the relationship is too remote.

Furthermore, there was ample reason for Congress, in view of its objectives, to give the phrase "national or international labor organization" its customary meaning. As the Board observed (75 N. L. R. B., at 15), the officers of the federations—

> are, with few exceptions, likewise officers of the autonomous international unions. In the latter capacity they have a strong incentive to comply with Section 9 (h);

> if they fail to do so, their own internationals lose the benefits of the Act. It is at this point that the shoe will, and should, pinch any top leaders of labor who choose not to comply. But, absent any impressive evidence to the contrary, we question whether Congress intended to take the further step of letting the action of those international officers who happen also to be members of the governing body of a parent federation determine the fate of the members of a wholly different international labor organization, all of whose local and international officers have complied in full.

And finally, as we have shown, *supra*, pp. 11–12, 83–84, the necessity of construing Section 9 (h) in its application to the major federations posed for the Board an intensely practical administrative problem. To follow the former General Counsel's interpretation would have meant that none of the locals and international unions could have utilized the Board's services at all, unless and until the internationals seceded from the federations or the federations expelled those internationals whose officers refused to file affidavits. Unless this happened, and in any event, in the meantime, Communist officers of local and international unions "would be under no pressure to stand up in the spotlight and be counted; the individual members of these unions, in turn, would lose all incentive to eliminate

such officers in order to enjoy the fruits of compliance" (75 N. L. R. B., at pp. 15–16).

The undisputed objective of Congress, to rid locals and internationals of Communist officers, could not under these circumstances even have begun to be effectuated. Moreover, even assuming that federation officers, after a time, would have filed the affidavits or been replaced, it was clear that to await that process would have meant that for a considerable period of time administration of the unfair labor practice and representation provisions of the Act would have had to cease. As the Board said (75 N. L. R. B., at p. 16): "Nothing it seems to us, could play more readily into the hands of dissension-seeking Communist leadership."

The Board was thus required to choose between an interpretation which would paralyze the Act, at least for a period, and one which would make it live. That it chose correctly is made clear by the expressed approbation of the Joint Committee, *supra*, pp. 85–89. In its Report to Congress on March 1, 1949, S. Rep. No. 986, 80th Cong., 2d Sess., Pt. 3, p. 3, the Committee said:

> Elimination of Communist partisans and adherents from official posts and positions of responsibility in both national and local unions is one of the most pronounced and significant effects of the Labor Management Relations Act, 1947. There are still unions, in a steadily declining number,

> however, whose officials have not filed non-Communist affidavits in compliance with the law. A number of unions have fully met this provision with the ouster of officials who have failed to meet this statutory requirement. It has been demonstrated that the American workingman will take steps to rid his union of communistic leadership when the character of that leadership has been identified to his satisfaction.

The Board was certainly justified in not delaying the initiation of this process until all officers of the federation complied.

The basic premise upon which the Courts of Appeals for the Fourth and Fifth Circuits predicated their rejection of the Board's view is that Congress intended in section 9 (h) "to wholly eradicate and bar from leadership in the American labor movement, *at each and every level,* adherents to the Communist Party and believers in the unconstitutional overthrow of our Government." [Italics added.] *National Labor Relations Board* v. *Postex Cotton Mills,* 181 F. 2d 919, 920 (C. A. 5); (R. 124). The House Report indicated it was Congress' desire that (H. Rep. No. 245 on H. R. 3020, p. 39): "[Communists] should be weeded out of the labor movement."

But indications of this nature as to the ultimate objective which Congress desired to achieve are not, in this instance at least, as reliable evidence of the means selected by Congress for achieving

its objective as are the words of the statute. The words of the statute make it unequivocally plain that the means Congress selected were not designed or intended to affect Communist leaders "at each and every level" of the trade union movement. Apart from the officers of the organization filing the petition or charge, the only organizations whose officers are affected by the affidavit requirement are "national or international" organizations with which the petitioning or charging organization is affiliated. But the structure of the American labor movement contains a great many other labor organizations which seldom, if ever, file petitions or charges themselves, with which local unions are affiliated. Within international unions there is often a regional organization between the locals and the internationals. See *e. g.*, Constitution of the Textile Workers Union of America, Article IX; Constitution of the International Association of Machinists, Article XVII. In addition, among A. F. L. unions, there are Central Labor Unions, which are city-wide federations of locals affiliated with A. F. L. internationals. Similarly, at the state level, there are state federations of labor with which the A. F. L. locals are affiliated. Likewise, in the C. I. O., there are city or county industrial union councils, with which all C. I. O. local unions in the area are affiliated, and state industrial union councils with which all locals in

the state are also affiliated.[43b] Each of these regional organizations, of course, have officers. Yet, clearly, these officers are not affected at all by Section 9 (h), since regional federations of this sort could not possibly be held to fall within the category of "national or international" organizations.

Congress' deliberate omission of regional federations like these, is, in fact, a further affirmative indication that Congress did not intend the affidavit or information requirements to apply at all to federations. For, if Congress had so intended it would, beyond doubt, have covered local as well as national federations, just as it covered a local charging union as well as the national or international union with which it is affiliated.

The Court below stated in its opinion in the instant case (R. 123) that in its view of the purpose of Congress,

> * * * it is much more important to exclude communists and others plotting the overthrow of the government by force from holding office in the great national labor organizations such as the C. I. O. and the A. F. L. than to exclude them from

[43b] Faulkner, Harold U. and Starr, Mark, *Labor in America* (Harper & Bros., 1944), pp. 112, 113–114; Hoxie, Robert F., *Trade Unionism in the United States* (D. Appleton-Century Co., 1936), pp. 126–128; Barbash, Jack, *Labor Unions in Action* (Harper & Bros., 1948), pp. 28–29; Taft, Philip, *Economics and Problems of Labor* (Stackpole Sons, 1942), pp. 505–506.

> office holding in their affiliates; and it is not reasonable to suppose that Congress did not intend the officers of the former to be covered by its provisions. It is true that it is the officers of the affiliates who call the strikes; but it is the officers of the national or parent organizations who shape labor policies that cause the strikes to be called, and this is particularly true of general strikes or strikes having a political purpose.

But if this position constituted an accurate reflection of the intention of Congress it is surprising that nowhere during the course of the lengthy debates on the bill, and nowhere in the reports, did anyone suggest that the bill was even intended to reach officers of the A. F. L. and the C. I. O., much less that it was more important to reach them than it was to reach the officers of locals or internationals. The legislative history shows that the example most often referred to of the evils which Congress desired to uproot was the Communist led and inspired political strike at Allis-Chalmers, note 32, *supra,* pp. 69–70. *American Communications Association* v. *Douds,* 339 U. S., at p. 388, cf. pp. 396, 407. That strike, as Congress was aware, was instigated by Communist leaders of the local, not by C. I. O. officers, and was certainly not the result either of policies or of program, of the C. I. O. As this Court pointed out in the *Douds* case, *ibid.,* "A full hearing [with respect to this strike] was given

not only to company officials, but also to leaders of the international and local unions involved." And the Report of the House Committee, quoted above p. 109, n. 19, which must certainly be regarded as authoritative as to this, establishes that Congress regarded the danger of Communist control as present in eleven national unions which had been captured by Communists, not in either of the two major federations.

Moreover, if the gauge of Congress' purpose and objectives applied by the Fourth Circuit were accurate, it is even more surprising that the Joint Committee, after the Board's decision in the *Northern Virginia* case, did not criticize the decision and recommend immediate amendment of the statute. The members of the Joint Committee, all members of the 80th Congress who played prominent roles in the enactment of Section 9 (h), may reasonably be thought to have been more familiar than anyone else with the actual objectives and purposes of Congress.

The Board, like the Courts of Appeals for the Fourth and Fifth Circuits, observed in its opinion in the *Northern Virginia* case, 75 N. L. R. B., at p. 14, that the purpose of Congress generally was "to eliminate Communist influence from the labor movement of the United States." But we submit that it does not follow from that alone that Congress intended to require affidavits from officers of all federations and other bodies, merely because such officers may be influential in the

labor movement. There are groups other than the two major federations, also national in scope, within the labor movement, whose officers also, to some extent "shape labor policies" and are "recognized as the spokesmen and representatives of organized labor in this country." Opinion of the Court below (R. 123), quoting Board Member Gray dissenting, in the *Northern Virginia* case. Among these, to name only a few, are the United Labor Policy Committee—set up by the major federations, the railroad brotherhoods and the large independent unions, to represent the American labor movement in the formulation of governmental policies for dealing with the present emergency [43c]—and the Political Action Committees of the A. F. L. and C. I. O. Under the Fourth Circuit's test officers of these organizations (and many more) would also be required to file affidavits before local unions could utilize the facilities of the Act. But organizations of this kind are certainly not normally considered "labor organizations;" they would clearly be excluded under the definition in Section 2 (5); and there is no showing whatever that Congress contemplated that Section 9 (h) would reach such groups. Indeed, as we have shown above, p. 116, the major federations are themselves affiliated with international federations, the officers of which are not entirely with-

[43c] 72 Monthly Labor Review (United States Department of Labor (January 1951), p. IV; 27 L. R. R. M. 81.

out influence in the labor movement here and abroad. Under the Fourth Circuit's test there would be no basis for holding that officers of such international federations were not also required to file affidavits as a condition to the use of Board facilities by a local union.

In short, we think, the line must be drawn somewhere if the objective of Congress is to be effectuated at all. Every indication in the language and scheme of the statute, as well as the specific evils which Congress was trying to eradicate, shows that the Board drew the line where Congress intended that it should be drawn. That the considerations which led to enactment of the statute might have warranted Congress in drawing the line more broadly does not prove that it did not draw the line where it did. In enacting Section 9 (h) Congress was legislating in an uncharted field which presented grave constitutional as well as practical problems. *American Communications Ass'n* v. *Douds, supra.* That its legislation may not have reached all levels of the labor movement is not surprising; Congress struck where the evils were most apparent and real. Congress may well have thought that its program would best be effectuated by a "cautious advance, step by step." *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411. To read unwarranted breadth into the language of a statute distorts the will of Congress no less than to read its legislation in "a spirit of muti-

lating narrowness." *United States* v. *Hutcheson*, 312 U. S. 219, 235.

C. *The Board's construction and application of Section 9 (h) is reasonable and should therefore be sustained.*

Even if Congress did not leave to the Board and the General Counsel exclusively the task of construing and applying Section 9 (h), it is certain that "That task has been assigned primarily to the agency created by Congress to administer the Act." *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130. Where, as in this case, "the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. * * * the Board's determination * * * is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Hearst* case, *supra*, 131. The test on review is "reasonableness and not rightness." [*] Accord: *Gray* v. *Powell*, 314 U. S. 402, 412–413; *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 146; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 153–154; *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 477–478; *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U. S. 194, 207.

[*] Davis, *Scope of Review of Federal Administrative Action*, 50 Col. L. Rev. 559, 572.

Even if the question be regarded as one of law the Board's construction is entitled to great weight for "it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. Application of that rule is particularly appropriate "if the scope of the command is indefinite and doubtful." *Ibid.* It is clearly pertinent here, for, as the Board observed in the *Northern Virginia* case, 75 N. L. R. B., at pp. 12–13, "no one can say * * * that Congress surely meant one thing or surely meant the other." And it must not be overlooked that the question on which the Board was here required to pass involved precisely those elements of familiarity with "a specialized field of knowledge" which entitles the agency's determination to "authority" in the courts. As this Court said in the *Universal Camera Corp.* v. *National Labor Relations Board*, No. 40, this Term, slip opinion, p. 13, the Taft-Hartley Act was not "intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."

Certainly it has not been shown, and it cannot

be shown, that the Board's construction was unreasonable. Under these circumstances the Board's construction is entitled to stand, even though some courts, or this Court, might prefer a contrary construction.

III

THE SUBSEQUENT COMPLIANCE OF THE C. I. O. HAS CURED ANY DEFECT IN THE UNION'S STANDING.

Even assuming that compliance by the C. I. O. is prerequisite to access by the charging union to the Board's facilities, nevertheless, the subsequent compliance by the C. I. O. has cured any incapacity which may have existed in the union at the time of the issuance of the Board's complaint. The C. I. O. came into full compliance on December 22, 1949. By virtue of the C. I. O.'s compliance, whatever disability originally existed in the union was lifted so that at the time the proceeding came before the Court of Appeals, Section 9 (h) presented no bar to the enforcement of the order.

Every consideration of equity and practicality calls for the determination of this proceeding on its merits rather than on procedural grounds. No reasonable purpose would or could be served by retroactively invoking Section 9 (h) of the Act to dismiss this proceeding because of the compliance status of the C. I. O. at the time of the issuance of the complaint. This condition has since been completely cured, and the policy

of Section 9 (h), to secure for the employees and the public the benefits incident to freeing unions from the influence of Communist and other subversive officers, has been fulfilled. A contrary view would lead only to a futile retracing of steps already taken. A dismissal of the complaint at this late date would leave outstanding the original charge, upon which the General Counsel could now issue an unassailable complaint and take the whole proceeding through to a new decision and order identical with the decision and order now before the Court.[45] The result of the whole undertaking "would only serve to delay final adjudication" (*Capitol Fire Ins. Co.* v. *Langhorne,* 146 F. 2d 237, 243 (C. A. 8), and it would be pointless to the extreme, for a "reversal to reach the same result later will

[45] Since the unfair labor practice in this case occurred while the Wagner Act was in effect and before the Taft-Hartley Act was even passed, there can be no question that the employer's obligation was not affected by any subsequent non-compliance by the union. This case, therefore, does not involve the question which the Government asked this Court to reserve in the *West Texas* case, No. 466, namely, whether non-compliance, if contemporaneously asserted by the employer as the reason for his refusal to bargain, relieves him of his obligation. See Memorandum for the National Labor Relations Boar in No. 466, this Term. Indeed, since the unfair labor practice occurred prior to the Amendments, this case does not even involve the issue decided by the Board in the *New Jersey Carpet Mills case*, 92 N. L. R. B. No. 122, 27 L. R. R. M. 1114, namely, that non-compliance by a charging union, if not contemporaneously asserted by the employer as his reason for refusing to bargain, does not relieve him of his statutory duty.

serve little purpose" (*National Labor Relations Board* v. *Quest-Shon Mark Brassière Co.*, 185 F. 2d 285, 289 (C. A. 2)).

Retroactively curing a disability of plaintiffs to sue is not new in law. Plaintiffs may be under a personal disability to bring suit although the conduct of which they complain unquestionably violates their rights. Examples are infants, alien enemies, corporations whose power to sue has been temporarily suspended by statute for failure to pay certain taxes or file certain papers, or an executor who has not fully qualified in a particular jurisdiction. Nevertheless, many have successfully maintained actions commenced during the period of their disability, surmounting objections directed to their capacity to sue by showing that their disability has been retroactively cured by intervening factors such as the passage of time or the taking of some action having the same effect in those proceedings as the C. I. O.'s coming into compliance has in this one.[46]

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[46] See *e. g.*, *Hall* v. *Citizens National Trust & Savings Bank*, 53 Cal. App. 2d 625, 128 P. 2d 545; *Diaz* v. *Parkland Estates*, 114 Fla. 273, 154 So. 199; *Germain* v. *Sheehan*, 25 Minn. 338; *Erie R. Co.* v. *Fritsch*, 72 F. 2d 766, certiorari denied, 293 U. S. 620; *Hamlin* v. *Stevenson*, 4 Dana (34 Ky.) 597; *Wyrosdick* v. *Age-Herald Pub. Co.*, 217 Ala. 657, 117 So. 28; *Bell* v. *Burkhalter*, 183 Ala. 527, 62 So. 786; *Holm* v. *Eastern Greyhound Lines*, 252 App. Div. 778, 299 N. Y. Supp. 154; *Hicks* v. *Beam*, 112 N. C. 642, 17 S. E. 490; *Hamersly* v. *Lambert*, 2 Johns Ch. (N. Y.) 508; *Maryland Casualty Co.* v. *Superior Court*, 91 Cal. App. 356, 267 Pac. 169; *California*

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment below should be reversed and the case remanded to the court below for further proceedings consistent with a holding that the validity of the Board's order is not affected by the fact that officers of the C. I. O. had not filed non-Communist affidavits at the time the complaint in this case was issued.

Respectfully submitted.

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Savings and Loan Soc. v. *Harris*, 111 Cal. 133, 43 Pac. 525; *Ward Land and Stock Co.* v. *Mapes*, 147 Cal. 747, 82 Pac. 426; *Shipman, Denny, Rhame & Co.* v. *Portland Constr. Co.*, 64 Ore. 13, 128 Pac. 989; *Smith* v. *Peckham*, 39 Wis. 414. As to the retroactive effect of this rule not impeding its application, see *Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 618, *et. seq.*

APPENDIX I

The pertinent provisions of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141 et seq.) are as follows:

SEC. 2. * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work.

* * * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this

Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Sec-

retary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of

employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

SEC. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof

upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause

to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case

may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set

forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and

by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

APPENDIX II

TABLE I.—*Over-all experience of labor unions with compliance with Secs. 9 (f), (g) (h) for 1 year beginning July 1948*

[Source: Official Records of Affidavit Compliance Branch, General Counsel's Office, N. L. R. B.]

	Local unions in compliance (number of unions)	Local unions lapsed (number of unions)		Local unions in compliance (number of unions)	Local unions lapsed (number of unions)
July 31, 1948	8,363	3,943	Jan. 31, 1949	6,790	8,538
Aug. 31, 1948	9,372	3,506	Feb. 28, 1949	7,652	7,899
Sept. 30, 1948	10,139	2,925	Mar. 31, 1949	8,646	7,403
Oct. 31, 1948	10,352	3,741	Apr. 30, 1949	9,484	6,829
Nov. 30, 1948	11,132	3,576	May 31, 1949	10,671	6,103
Dec. 31, 1948	7,901	7,200	June 30, 1949	9,101	7,866

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TABLE II.—*Experience of 9 representative unions with compliance with Secs. 9 (f), (g) (h)*

[Source: Records of Affidavit Compliance Branch, General Counsel's Office, N. L. R. B.]

	9 (h)		9 (f) and (g)		Compliance lapsed
	In compliance	Compliance expired	In compliance	Compliance expired	
Union A	12- 1-47	4-30-49	7-19-48	12-31-48	12-31-48 to 1-7-49 9 (g).
	5- 2-49	4- 4-50	1- 7-49	3-31-49	3-31-49 to 4-4-49 9 (g).
			4- 4-49	12-31-49	4-30-49 to 5-2-49 9 (h)
Union B	11-14-47	6-30-48	12- 4-47	6-30-48	6-30-48 to 7-15-48 9 (g).
	8- 9-48	6-16-49	7-15-48	9-30-49	6-30-48 to 8-9-48 9 (h)
	6-28-49	6-18-50			6-16-49 to 6-28-49 9 (h).
Union C	10-20-47	12-31-47	4-14-48	10-31-49	10-31-48 to 3-15-49 9 (g)
	2-20-48	12-31-48	3-15-49	10-31-49	12-31-47 to 2-20-48 9 (h).
	3-15-49	12-31-49			12-31-48 to 3-15-49 9 (h).
Union D	9- 5-47	12-31-47	1-16-48	12-31-48	12-31-48 to 1-19-49 9 (g)
	1-12-48	7- 1-48	1-19-49	3-31-49	3-31-49 to 4-7-49 9 (g).
	7-15-48	12-23-48	4- 7-49	12-31-49	12-31-47 to 1-12-48 9 (h).
	1-18-49	12-31-49			7-1-48 to 7-15-48 9 (h).
					12-23-48 to 1-18-49 9 (h).
Union E	11- 7-47	12-31-47	12-10-47	12-31-47	12-31-47 to 5-3-48 9 (g).
	5- 3-48	12-31-48	5- 3-48	12-31-48	12-31-48 to 3-14-49 9 (g).
	3-14-49	12-31-49	3-14-49	12-31-48	12-31-47 to 5-3-48 9 (h.)
					12-31-48 to 3-14-49 9 (h).
Union F	11-24-47	12-31-47	11-24-47	12-31-48	12-31-48 to 1-7-49 9 (g).
	3-22-48	6- 7-48	1- 7-49	12-31-49	12-31-47 to 3-22-48 9 (h).
	6-14-48	12-31-48			6-7-48 to 6-14-48 9 (h).
	1- 5-49	1- 2-50			12-31-48 to 1-5-49 9 (h).
Union G	10-29-47	1- 1-48	10-29-47	12-31-47	12-31-47 to 3-18-48 9 (g).
	2- 2-48	1-30-49	3-18-48	12-31-48	12-31-48 to 1-14-49 9 (g).
	2- 7-49	1- 1-50	1-14-49	12-31-49	1-1-48 to 2-2-48 9 (h).
					1-30-49 to 2-7-49 9 (h).
Union H	1-27-49	1- 5-49	3-22-48	11-10-48	11-10-48 to 11-24-48 9 (g).
	4-18-47	1-11-50	11-24-48	12-31-48	12-31-48 to 4-6-49 9 (g).
			4- 6-49	12-31-49	1-5-49 to 4-18-49 9 (h).
Union I	11- 3-47	12-31-47	12- 8-47	12-31-47	12-31-47 to 1-27-48 9 (g).
	1-12-48	12-31-48	1-27-48	12-31-48	12-31-48 to 2-15-49 9 (g).
	2-11-49	12-31-49	2-15-49	12-31-49	12-31-47 to 1-12-48 9 (h).
					12-31-48 to 2-11-49 9 (h).

Union A—Hod Carriers—Local 89, A. F. L.
Union B—Carpenters—Local 530, A. F. L.
Union C—Moulders—Local 735, Ind.
Union D—Machinists—Local 735, Ind.
Union E—Brewer Dry Dock Employees Assn., Inc.
Union F—Machinists Local 1047, Ind.
Union G—Retail Clerks—Local 157.
Union H—Bakery—Local 119, A. F. L.
Union I—Bakery—Local 183, A. F. L.

APPENDIX III

No. 11128

United States Court of Appeals for the Sixth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ARTHUR J. WILTSE, DOING BUSINESS AS THE ANN ARBOR PRESS, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

Decided March 23, 1951

Before SIMONS, MCALLISTER, and MILLER, Circuit Judges.

MCALLISTER, Circuit Judge. The National Labor Relations Board filed its petition for enforcement of its order requiring respondent to reinstate workers alleged to have been discharged as a result of unfair labor practices in violation of the National Labor Relations Act, as amended; to cease and desist from discouraging membership in a union and from interfering with and coercing employees in the exercise of their right to engage in concerted activities; and to post appropriate notices. In answer, respondent submits that, under various provisions of the Act, the Board was without jurisdiction to hear and determine the controversy; that respondent's operations

did not affect interstate commerce, and that there was not sufficient admissible evidence in the record to sustain the Board's findings that respondent was guilty of unfair labor practices.

The National Labor Relations Act, as amended, known also as the Labor-Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. Supp. III, Sections 151, et seq., provides that no investigation shall be made by the Board of any question affecting commerce concerning the representation of employees raised by a labor organization, and that no petition of such an organization shall be entertained or complaint issued pursuant to a charge by a labor organization, unless such organization and any national or international labor organization of which it is an affiliate shall have filed with the Secretary of Labor copies of its constitution and bylaws and certain other information as to its procedures and finances, and distributed its financial statement to its members, and shall have filed with the Board affidavits of its officers that they are not members of the Communist Party. Sections 9 (f), (g), and (h) of the Act, 29 U. S. C. A., Sections 159 (e), (f), and (g).

There was no proof in the proceedings before the Board, or in this court, that that union, here in question, had complied with the requirements of the above mentioned provisions of the Act. Failure to comply was not pleaded as a defense by the answer.

On the principal issue in this controversy, respondent contends that Sections 9 (f), (g), and (h) of the Labor-Management Relations Act are jurisdictional; that compliance with the require-

ments of these sections by the union must be shown before the Board has jurisdiction to proceed; and that since there was no showing that the union had complied with these sections, the Board had no jurisdiction to issue its complaint or enter its order in this case.

In *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. (2d) 840 (C. A. 4), similar contentions were considered and determined. In that case, in passing upon the argument that the Board was without jurisdiction to enter its order because the union had not complied with the above-mentioned sections of the statute, Judge Parker, speaking for the court, said:

> The company's contention that the Board was without jurisdiction to enter the order is based upon an allegation in the answer before the Board to the effect that the union upon whose petition the complaint of the Board was filed had not complied with the requirements of section 9 (f), (g), and (h) of the Labor-Management Relations Act. These provisions of the statute require that labor organizations desiring to obtain the benefits of the act shall file certain operational and financial statements with the Secretary of Labor, distribute the financial statement to their members, and have their officers submit affidavits that they are not members of the Communist Party. There is nothing whatever in the evidence, however, to show that the union has not complied with these statutory requirements; and, in the absence of proof to the contrary, we must assume that they have been complied with * * * Where there is nothing to show, therefore,

> that the union has failed to comply with the statutory provisions, where general counsel has filed a complaint upon its petition, and where the Board has granted relief upon the complaint, we must assume that the law has been complied with. Omnia praesumuntur rite esse acta. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15, 47 S. Ct. 1, 71 L. Ed. 131; *Smith* v. *St. Louis & S. W. Ry. Co.,* 181 U. S. 248, 258, 21 S. Ct. 603, 45 L. Ed. 847.

In answer to the claim that compliance must first be shown before the Board has jurisdiction to file complaint, hear the controversy, and enter its order, the court observed:

> The company contends that compliance with the statutory provisions is jurisdictional and that compliance must be shown before the Board has jurisdiction to proceed. There is nothing in the language of the statute expressly requiring this; and if such view were to be taken, it would greatly hamper the administration of the act, since it would be incumbent upon the general counsel to show compliance, not only with the requirements as to filing affidavits but also with those requiring the giving of notice to members; and this he would have to do in every case, even though there were no question as to compliance. Surely nothing of the sort was contemplated in the passage of the statute; and it is well settled that the courts will not construe a statute in such way as to make it administratively unworkable if any other construction is possible. *Haggar* v. *Helvering,* 308 U. S. 389, 394, 60 S. Ct. 337, 84 L. Ed. 340; *Gruver* v. *Com'r,* 4 Cir., 142 F. 2d 363, 366; *Fides* v. *Com'r,* 4 Cir., 137 F. 2d 731. We think it clear that the

> requirement of the statute goes, not to the jurisdiction of the Board, but to the standing of the union to ask relief before it. As said by Mr. Justice Holmes in *Fauntleroy* v. *Lum*, 210 U. S. 230, 235, 28 S. Ct. 641, 642, 52 L. Ed. 1039: "No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty, of the court. * * * Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense."

In addition to the persuasiveness of the foregoing opinion, other sections of the statute, and the report of the Congressional Committee provided thereunder, are illuminating in arriving at a determination whether the failure to allege or prove compliance of the union with Sections 9 (f), (g) and (h) of the Act were jurisdictional conditions precedent.

Among the most important provisions of the Labor-Management Relations Act of 1947 was the creation of "a joint congressional committee, to be known as the Joint Committee on Labor-Management Relations * * *, and to be composed of seven Members of the Senate Committee on Labor and Public Welfare, to be appointed by the President pro tempore of the Senate, and seven Members of the House of Representatives Committee on Education and Labor, to be appointed by the Speaker of the House of Representatives." It was further provided that the

committee should elect a chairman and vice chairman from among its members, and, acting as a whole or by subcommittee, should conduct "a thorough study and investigation of the entire field of labor-management relations, including but not limited to—

(1) the means by which permanent friendly cooperation between employers and employees and stability of labor relations may be secured throughout the United States;

(2) the means by which the individual employee may achieve a greater productivity and higher wages, including plans for guaranteed annual wages, incentive profit-sharing and bonus system;

(3) the internal organization and administration of labor unions, with special attention to the impact on individuals of collective agreements requiring membership in unions as a condition of employment;

(4) the labor relations policies and practices of employers and associations of employers;

(5) the desirability of welfare funds for the benefit of employee and their relation to the social-security system;

(6) the methods and procedures for best carrying out the collective bargaining processes, with special attention to the effects of industry-wide or regional bargaining upon the national economy;

(7) the administration and operation of existing Federal laws relating to labor relations; and

(8) such other problems and subjects in the field of labor-management relations as the committee deems appropriate.

The purpose of the Committee, in making a thorough study and investigation of the entire field of labor-management relations, was to submit a report and recommendations for legislation, and the Act provided:

> The committee shall report to the Senate and the House of Representatives not later than March 15, 1948, the results of its study and investigation, together with such recommendations as to necessary legislation and such other recommendations as it may deem advisable, and shall make its final report not later than January 2, 1949. (Sections 401, 402, 403 of the Labor-Management Relations Act of 1947.)

The Joint Committee on Labor-Management Relations made its report to Congress in 1948 (Senate Report 986, Part 3, 80th Cong., 2d Sess., page 45) and embodied its conclusions with respect to the non-Communist affidavit requirement, as follows:

> The committee believes that the non-Communist affidavit provision has already demonstrated its effectiveness as an aid to unions and their members in their desire to drive the Communists from positions of power in labor organizations. Since that point having been established beyond argument, consideration should be given by Congress to perfecting the approach to the problem. Communists do not give up easily and have and will take quick advantage of any loopholes which appear in the law. Control of the labor movement has been the Communists' most effective means of gaining ultimate control of the government itself in many European countries.

> The committee wishes to emphasize as strongly as possible that in any consideration of amendments to this section, great care must be given to prevent litigation of the question in Board hearings. If the parties to Board hearings are permitted to question the veracity of the affidavit, or the fact as to it having been filed, records will be hopelessly overburdened with such proof. Board hearings must be confined to evidence going into merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargaining representatives. The Board recognized this principle in *Lion Oil Co.* (15—R—2264) when it upheld the ruling of the hearing officer in his denial of the employer's motion to dismiss the petition since the record did not show the petitioning union had complied with the requirements of section 9 (f) and (h). The Board said that compliance is clearly for the Board to determine and its official records indicated that the union had complied.

In the *Lion Oil Co.* case mentioned and approved in the Committee's report (76 N. L. R. B., pages 565, 566), the Board had stated, in its decision:

> The Employer further contends that the petition should be dismissed because the Congress of Industrial Organizations, with which the Petitioner is admittedly affiliated, has not complied with the filing requirements of Sections 9 (f) and (h) of the Act. We have affirmed the hearing officer's denial of the motion to dismiss for the reasons detailed in *Matter of Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. 11.

The Employer also argues that, as the record does not affirmatively show that the Petitioner has complied with the requirements of Section 9 (f) and (h), the petition should be dismissed. In view of the language of those sections, however, precluding *the Board* from investigating any question concerning the representation of employees where the requirements have not been met, the matter of compliance is clearly one for the Board to determine in any manner suited to the circumstances. As the official records of the Board indicate that the Petitioner has complied with the requirements of those sections, the hearing officer's denial of the Employer's motion to dismiss was proper.[1]

In *National Labor Relations Board* v. *Postex Cotton Mills, Inc.*, 181 F. (2d) 919 (C. A. 5), it

[1] The decision in *Northern Virginia Broadcasters, Inc.*, referred to in the Board's decision in the *Lion Oil Co.* case, was summarized in the report of the Joint Committee on Labor-Management Relations, as follows:

"The issue was presented to the National Labor Relations Board in the case of *Northern Virginia Broadcasters, Inc.* (75 N. L. R. B. No. 2). Local 1215 of the International Brotherhood of Electrical Workers, AFL, had filed a petition for a collective bargaining election. Both local 1215 and the International Brotherhood of Electrical Workers had filed the required affidavits and had complied with the registration requirement. Pursuant, however, to the ruling of the general counsel, the regional director dismissed the petition because the officers of the parent AFL had not filed non-Communist affidavits and a registration statement. The union appealed to the Board to reverse the action of the regional director in dismissing the petition. The Board, acting on the appeal, in a divided opinion set aside the dismissal and reinstated the union's petition." (Senate Report No. 986, 80th Cong., 2d Sess., Part 1, page 11.)

was held that where officers of a parent union had not filed required non-Communist affidavits provided for in the National Labor Relations Act, the Board was not authorized to issue a complaint upon a charge filed by an affiliated union, notwithstanding that the officers of the affiliated union had filed the required affidavits. A contrary construction was reached in *West Texas Utilities Co.* v. *National Labor Relations Board,* 184 F. (2d) 233 (C. A. D. C.); and in *National Labor Relations Board* v. *Highland Park Mfg. Co.,* 184 F. (2d) 98 (C. A. 4), the court considered the two foregoing cases and agreed with the construction of the court in the *Postex* case. While the *Highland Park case* is cited by respondent as authority in the instant case, it is not here applicable for the same question is not before this court. The issue here is whether compliance with Section 9 (f), (g), and (h) of the Act are jurisdictional and must be shown before the Board has jurisdiction to proceed. Judge Parker, who wrote the opinion of the court in the *Greensboro Coco Cola Bottling Co.* case, *supra,* holding compliance not jurisdictional, as well as in the *Highland Park* case, was obviously of the view that the two cases were concerned with entirely different issues, with which conclusion we are in accord.

Respondent submits that the above-mentioned portion of the report of the Joint Congressional Committee on Labor-Management Relations is not persuasive of the interpretation to be given to the Act since this was not the committee that proposed its adoption, but, rather, one created by the Act itself; that the opinions rendered by such

committee are *ex post facto* and have no weight or significance in interpreting the provisions of the statute; and that its views, as set forth in its report, are not persuasive as to Congressional intent in the matter.

For the past fifteen years since its passage by Congress, the National Labor Relations Act has aroused perhaps more controversy than any statute enacted during that period. Continuous debates in Congress finally led to the amendment of the law, through the enactment of the Labor-Management Relations Act, known as the Taft-Hartley Act, in 1947. Congress at that time was deeply concerned with the manner in which the amended Act would operate and, accordingly, as mentioned above, the Act provided for the Joint Congressional Committee to carry on a continuing thorough study and investigation of labor-management relations, including the administration of the federal laws relating to labor relations, with the object of reporting back to Congress the results of its investigation, together with recommendations for further legislation on the subject. Among the members of such Joint Congressional Committee, it is to be noted, were Senator Taft and Representative Hartley, authors and sponsors of the Labor-Management Relations Act which bore their name. The report of the Committee was made in the first part of 1948; and since that time, there have been two national Congressional elections in which one of the principal issues was the Taft-Hartley Act.

Debates have continued with regard to this legislation both in the Senate and the House of Representatives; but no amendments have been

made by Congress with respect to the so-called compliance sections here in question. Under such circumstances, we consider this to be persuasive evidence of the adoption by Congress of the construction given the filing requirements here in question by the Board, in the *Lion Oil Co.* case, *supra*, which was set forth in the report of the Joint Congressional Committee. In fact, most reasonable inferences can be drawn that the construction of the statute contended for by the respondent in the *Lion Oil* case, like that contended for by respondent in the instant case, failed of Congressional approval. See *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *Missouri* v. *Ross*, 299 U. S. 72; *United States et. al.* v. *American Trucking Assns., Inc., et. al.*, 310 U. S. 534. Moreover, it is to be said that respondent's contention that compliance with the filing requirements must be shown before the Board has jurisdiction to proceed, is in conflict with the explanation given by Senator Taft to the Senate when he declared that under Section 9 (f) of the Act, the financial reports required to be filed by the unions were not to be available to the public.[2]

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[2] In explaining the bill, Senator Taft said: "The bill provides that unions must file financial reports on forms certified by the Secretary of Labor and furnish the reports to all of their members, and file a copy with the Secretary of Labor. Such reports are not open to the public, any more than corporation reports are open to the public; but they are open to inspection by the members, and they are also open to proper Government officials. There is no special provision, but they are not specifically provided to be open to the public" (93 Cong. Rec. 3839).

From the foregoing, it is our conclusion that it was not necessary to allege and prove compliance on the part of the union with the requirements of Sections 9 (f), (g), and (h) of the Act as a condition precedent to the exercise of jurisdiction over the controversy by the Board. It may be remarked that, although the fact does not appear in the record, it is submitted by the Board that the American Federation of Labor, the parent union in this case, was in full compliance with Sections 9 (f), (g), and (h) of the Act prior to the issuance of the complaint against the respondent. But that is unnecessary to consideration in this case, in view of our holding that the Board was not required to allege and prove compliance, and that compliance with such provisions was not jurisdictional.

Having disposed of the foregoing jurisdictional question, we agree that it is unnecessary to pass upon petitioner's further contention that failure to comply with the above-mentioned filing requirements does not present a litigable issue in that they are administrative provisions not subject to review.

[Remainder of opinion relating to question whether there was sufficient evidence to sustain the Board's order, omitted.]

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